Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ORLEANS PARISH SCHOOL BOARD,

Petitioner,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Orleans Parish School Board is an "arm" of the State of Louisiana entitled to Eleventh Amendment sovereign immunity from federal jurisdiction that is based solely on Article III diversity of citizenship.

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PETITION FOR WRIT OF CERTIORARI

Orleans Parish School Board respectfully prays that a writ of certiorari issue to review the subject matter jurisdiction of the federal court in light of the Eleventh Amendment prohibition against Article III diversity jurisdiction over political subdivisions that function as "arms" of a state.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Louisiana that give rise to this appeal are reprinted herein.

JURISDICTION

Jurisdiction is based on 28 U.S.C. 2101 (c), which authorizes any writ of certiorari, intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court. The final judgment by the Fifth Circuit was entered on May 22, 1997.

STATEMENT OF THE CASE

Applicant, a political subdivision of the State of Louisiana, filed a suit in the Civil District Court for the Parish of Orleans against several manufacturers of asbestos products alleging damages based solely upon state law. Subsequently, the defendants removed the suit to the

United States District Court for the Eastern District of Louisiana alleging diversity of citizenship as a basis for federal court jurisdiction.

Applicant moved to remand the case back to the state court on the basis that diversity was not complete. The district court denied Applicant's motion and its denial was subsequently affirmed by the United States Court of Appeals for the Fifth Circuit. During the course of discovery all of the defendants except the current defendant, W. R. Grace were dismissed from the suit. On motion by W.R. Grace for summary judgment based upon prescription, the district court dismissed Applicant's complaint. Applicant appealed the dismissal to the Fifth Circuit which by judgment entered on May 22, 1997 affirmed the dismissal. Applicant brings this petition to question the subject matter jurisdiction of the court under the Eleventh Amendment. This issue was not presented to the district court or appellate court because it is based in large measure on the most recent pronouncements of this Court on state sovereignty principles.

REASONS FOR GRANTING THE WRIT

Preserving the sovereignty of the state within a dual sovereignty system of government is the principal factor that informs Eleventh Amendment analysis

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by a Citizen of another State, or by Citizens or Subjects of any Foreign State.

Since the adoption of the Eleventh Amendment, the jurisprudence has been consistent that absent express consent, states are immune from Article III diversity of citizenship federal jurisdiction. The amendment was a direct response to the federal court's assertion of original jurisdiction in 1793 over a lawsuit brought by a citizen of South Carolina against the State of Georgia styled *Chisholm v. Georgia,* Dall 419 (1793).[1]

The impetus for the passage of the amendment was the fear on the part of the states that their treasuries could be depleted by such lawsuits unless the Constitution explicitly acknowledged their sovereign immunity from federal jurisdiction.[2] Although the language of the amendment appears narrowly drafted to avert the threat posed by *Chisholm,* it nonetheless embodies and reflects the important principle that each state retained its sovereignty in the union.

For over a century, courts have recognized that the immunity provided in the Eleventh Amendment flowed from the inherent sovereignty of each state of the union. *Hans v. Louisiana,* 134 U.S. 1 (1890) emphasized that Eleventh Amendment immunity must be interpreted in light of the principle of individual state sovereignty that it embodies. The courts have "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms." *Blatchford v. Native*

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[1] *Monaco v. Mississippi,* 292 U.S. 313, 325 (1934).

[2] *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 151 (1984) (Stevens, J., dissenting); see also *Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 276, n. 1 (1959); *Missouri v. Fiske,* 290 U.S. 18, 27 (1933).

Village of Noatak, 501 U.S. 775, 779 (1991). The presupposition is that under our federal system of government each state as a sovereign power in itself is entitled to the respect and dignity befitting a sovereign by the federal sovereign. *Hans v. Louisiana*, 134 U.S. 1 (1890); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The two primary and often competing philosophies underpinning Eleventh Amendment analysis reflect concern for the effect of litigation on the state's public fisc and the dignity of the state.[3]

Justice Stevens acknowledges the competing philosophies in Eleventh Amendment analysis in his concurring opinion in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994)

> Yet since *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court has interpreted the Eleventh Amendment as injecting broad notions of sovereign immunity into the whole corpus of federal jurisdiction. The Court's decisions have given us "two Eleventh Amendments", one narrow and textual and the other not truly a constitutional doctrine at all based on prudential considerations of comity and federalism.

There is a long line of Eleventh Amendment decisions based upon the first consideration – the perceived financial impact upon the state. See, *Hess v. Port Authority Trans-Hudson Corp.*; *Baxter v. Vigo Cty. School Corp.*, 26 F.3d 728, 732-733 (CA7 1994) (most significant factor is whether entity has power to raise its own funds); *Hutsell*

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[3] *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394 (1994).

v. Sayre, 5 F.3d 996, 999 (CA6 1993) ("The most important factor . . . is whether any monetary judgment would be paid out of the state treasury."), cert. denied, 510 U.S. 1119 (1994).[4]

There is another line of cases where the outcome is predicated upon a concern for preserving the dignity of the state. Understanding that an important attribute of sovereignty is immunity from suits, *Hans* extended the reach of the amendment to cover suits brought against a state by its own citizen.

To protect the state's sovereignty or fiscal interest, the courts have extended sovereign immunity to cover state agencies, other government entities that serve as arms of the state, as well as their employees acting officially. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). During the last court term, the Court barred federal court jurisdiction over a suit requesting declaratory and injunctive relief against the state of Idaho, thus diminishing the *Ex Parte Young*[5] exception to sovereign immunity claims. Though Justice O'Connor's concurring opinion rested upon the economic impact on the state as grounds for the dismissal of the claim, the principle opinion authored by

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[4] See Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033, 1129 (1983) (identifying "the award of money judgments against the states" as "the traditional core of eleventh amendment protection").

[5] 209 U.S. 123 (1908).

Justice Kennedy invoked the dignity and status of the state in restricting the jurisdiction of the federal courts.

> Under these particular and special circumstances, we find the Young exception inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case. *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___ (June 23, 1997)

Finally, strong endorsement of the states' sovereign status in the context of a Tenth Amendment analysis in *Printz v. U.S.*, ___ U.S. ___ (1997) bears strong implications for sovereign immunity in the Eleventh Amendment arena.[6]

The courts have not extended the state's sovereign immunity to cover its municipalities and counties (parishes in the case of Louisiana). *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 313 (1990); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) ("[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even [where] such entities exercise a 'slice of

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[6] Justice Breyer's dissenting opinion in the *Printz* case observed that "[E]ven if the protections that the majority describes as rooted in the Tenth Amendment ought to benefit state officials, it is difficult to reconcile the decision to extend these principles to local officials with our refusal to do so in the Eleventh Amendment context. If the federal judicial power may be exercised over local government officials, it is hard to see why they are not subject to the legislative power as well." P. 17-18.

state power' "); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989) ("States are protected by the Eleventh Amendment while municipalities are not."); See also, *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 47 (1994).

Sovereign immunity ought to be extended to political subdivisions of a state if failure to do so would adversely impact the state's dignity and status as a sovereign power

The difficulty comes in applying Eleventh Amendment analysis with respect to those political subdivisions that are neither state agencies nor municipalities but possess features of both.

The decisions in this area often turn on the issue of the financial relationship and arrangement between the entity in question and the state. If the entity is self-sufficient and receives little or no financial aid from the state then it is denied sovereign immunity. On the other hand, if a judgement against a thinly capitalized entity implicates state funds then to protect the state funds, the court extends sovereign immunity to the entity.

In *Alaska Cargo Transport, Inc. v. Alaska R. Corp.*, 5 F.3d 378, 381 (CA9 1993), for example, Eleventh Amendment immunity was accorded a thinly capitalized railroad that depends for its existence on a state-provided "financial safety net of broad dimension". In *Morris v. Washington Metropolitan Area Transit Authority*, 781 F.2d 218 (CADC 1986), the court extended Eleventh Amendment immunity to cover an interstate transit system that was known to be under-capitalized from its inception and which

depended upon participating governments to meet its budget.[7]

In other cases, the state's own characterization of the nature of the entity was the decisive factor in the outcome of the analysis. In *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977), the Court found that Ohio laws characterized the plaintiff school district as possessing features more akin to a municipal entity than a state entity.

> The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law. Under Ohio law the "State" does not include "political subdivisions," and "political subdivisions" do include local school districts. Ohio Rev. Code Ann. § 2743.01 (Page Supp. 1975).

In *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 401, Justice O' Connor in dissent advanced a test to determine the applicability of sovereign immunity to a state entity based upon the degree of control and supervision that the state exercises over the state entity. The critical element in Eleventh Amendment analysis is:

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[7] *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 49-50 (1994).

> [W]hether the State possesses sufficient control over an entity performing governmental functions that the entity may properly be called an extension of the State itself.

Applicant contends that under any test the Orleans Parish School Board qualifies for sovereign immunity protection from the jurisdiction of the federal court in the subject matter of this lawsuit. However, any test ought to answer the question of whether withholding sovereign immunity from a state entity would adversely affect the sovereignty interest of the state. We argue that denying sovereign immunity to the Orleans Parish School Board would affect the State's sovereignty interests.

The Orleans Parish School Board is an arm of the State of Louisiana for Eleventh Amendment purposes

By virtue of its characterization under Louisiana law, its financial dependence on State funds and its relationship with BESE, the Orleans Parish School Board is an arm of the State for Eleventh Amendment Purposes

Article VIII of the Louisiana Constitution of 1974 defines the structure of public education for the state. It provides for a four-board structure to govern public higher education. Public elementary and secondary education in Louisiana operates under the overall management of the state's Board of Elementary and Secondary Education (BESE). The State Department of Education, under the direction of the State Superintendent of Education, in turn, implements the policies set forth by BESE. Sixty-six local school boards administer the public schools under their respective jurisdiction.

Paragraph 3 of Article VIII defines BESE's functions as:

> The State Board of Elementary and Secondary Education is created as a body corporate. It shall supervise and control the public elementary and secondary schools, vocational-technical training and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law. The board shall have other powers, duties, and responsibilities as provided by this constitution or by law, but shall have no control over the business affairs of a parish or city school board or the selection or removal of its officers and employees.

The State Superintendent of Education administers the policies of BESE as set forth in Paragraph 2 of Article VIII as follows:

> There shall be a superintendent of education for public elementary and secondary education who, subject to provisions for appointment in lieu of election set forth in Article IV, Section 20, of this constitution, shall be elected for a term of four years. If the office is made appointive the State Board of Elementary and Secondary Education shall make the appointment. He shall be the administrative head of the Department of Education and shall implement the policies of the State Board of Elementary and Secondary Education and the laws affecting schools under its jurisdiction. The qualifications and other powers, functions, duties, and responsibilities of the superintendent shall be provided by law.

Louisiana Constitution leaves no doubt that while the school boards manage the day to day activities under their respective jurisdiction; they operate under the supervision and control of BESE. Section 10(A) of Article VIII reads:

> Parish and city school board systems in existence on the effective date of this constitution are recognized, *subject to control and supervision by the State Board of Elementary and Secondary Education* and the power of the legislature to enact laws affecting them. (Emphasis Added)

Although BESE does not have the authority to hire and fire the employees of the individual board members or to interfere in the board's day to day activities, it is authorized to determine the qualifications for the superintendent employed by each school board. Parishes and municipalities are not subject to such oversight by the state.

> Each parish board shall elect a superintendent of parish schools. The State Board of Elementary and Secondary Education shall fix the qualifications and prescribe the duties of the parish superintendent. He need not be a resident of the parish in which he serves. Paragraph 9 of Article VIII.

Article VI of the Louisiana Constitution, which sets forth the powers of local government, differentiates consistently between school boards on the one hand, and parishes and municipalities on the other. Section 44 defines parishes, municipalities, and school boards

among other local governmental units as political subdivisions. However, Article VI categorizes only parishes and municipalities as local governmental subdivisions.

Local governmental subdivisions enjoy greater autonomy and a larger measure of self-rule. They can choose to organize under home rule charter granting significant autonomy, an option specifically denied school boards.

> (G) Parish Officials and School Boards Not Affected. No home rule charter or plan of government shall contain any provision affecting a school board or the offices of district attorney, sheriff, assessor, clerk of a district court, or coroner, which is inconsistent with this constitution or law.

Although it receives funds from other sources most of the funds received by the Orleans Parish School Board comes through the state's Minimum Foundation program administered by BESE. No parish or municipality is as dependent upon the state fisc as are the school boards.

More importantly, the State of Louisiana played a leading role in activities leading up to this particular suit as its laws reflect.

The Orleans Parish School Board functioned as an arm of the State in carrying out duties prescribed by the State in its exercise of its sovereign powers to protect the health of the state's children.

Exercising its sovereign power to protect the health of its children, the state instituted a statewide effort to identify and assess the risks present in schools because of

asbestos. The legislature passed a statute called the Louisiana Educational Facilities Asbestos Detection Program. It declared the purpose of the program to be as follows:

> A. The legislature finds that friable asbestos in any environment occupied by human beings creates a serious hazard to health. The existence of such hazards should not be tolerated in the elementary and secondary schools in this state, and it is incumbent upon state government to take the initiative to see that such hazards are detected and removed.
>
> B. It is the purpose of this Chapter to provide a mechanism by which the presence of friable asbestos in the elementary and secondary school facilities occupied by the school children of this state can be detected so that it may be removed in order that the children may learn and grow in an environment which does not threaten their welfare in any manner.[8]

The statute authorized the State Superintendent of Education to coordinate the statewide effort to assess and fix the risks of exposure to asbestos in the schools.

> 17:3708. Department; duties; powers; responsibilities
>
> A. The state superintendent of education shall designate a central office or person within the department to coordinate this program. Such office or person shall: (1) Inform each school in the state of the program and how to participate. (2) Function as a central point for the receipt and dissemination of all relevant information and reports. (3) Act as liaison with any federal

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[8] L.R.S. 17:3701

or other programs which may now or hereafter provide funds or assistance in any manner in detecting and eliminating friable asbestos. (4) Act as the coordinating body between the department and each university.

B. The department shall designate two state universities, one of which shall be the University of New Orleans and the other of which shall be the University of Southwestern Louisiana which shall provide these services to schools in the eastern part of the state and the western part of the state respectively to participate in this program and do those things required in R.S. 17:3707. In the event either university shall decline to provide the services required hereunder, the department shall engage another or other universities capable of rendering such services to render same.

C. The department shall adopt rules and regulations, not inconsistent with the provisions of this Chapter, necessary to the efficient and effective operation of this program.[9]

The statutory scheme even invoked the Office of the Attorney General to furnish legal advice to the school boards and approval of lawsuits against those responsible for the presence of the hazards.

A. Notwithstanding any other provision of law to the contrary and in furtherance of the purpose stated in Subsection A of Section 3701 of this Chapter, the attorney general upon the request of any city or parish school board shall:

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[9] L.R.S. 17:3708

(1) Provide assistance in evaluating whether the school board has sufficient grounds to initiate a civil suit for damages against a manufacturer, supplier, or installer of asbestos materials that have been used in any public school as a result of damage suffered by the school board because of the existence of asbestos materials in such school and whether such a suit, if brought, has a reasonable chance of concluding in a favorable result for the school board.

(2) Initiate and conduct any civil suit for damages as described in Paragraph (1) of this Subsection on behalf of the school board which the attorney general has advised has a reasonable chance of succeeding.

B. Whenever any civil suit initiated and conducted pursuant to Subsection A of this Section results in the collection by the school board of monetary damages, the school board shall reimburse the attorney general, upon his request, for any vouchered expenses and costs incurred in the conduct of the lawsuit not to exceed forty percent of the amount of the collected monetary damages.[10]

Subsequently, the legislature passed an act called "Louisiana School Asbestos Abatement Act"[11] to effect the abatement of asbestos products in schools. Following the dictates of that Act, which reflected the policy position of the State of Louisiana, the Orleans Parish School Board proceeded to conduct abatement at a considerable

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[10] L.R.S. 17:3713

[11] L.R.S. 30:2341 et seq.

cost out of its operating budget. This suit was instituted against the various parties to recover those funds expended.

Applicant avers that it acted in all respects as an arm of the State of Louisiana in pursuing the stated policy of the State as expressed in the laws cited herein and is entitled to sovereign immunity protection.

CONCLUSION

The petition for writ of certiorari should be granted for the foregoing reasons and because the Court's recent analysis in *Printz* of state sovereignty issues under the Tenth Amendment resonates in the Eleventh Amendment arena as well.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-30670

(Filed May 22, 1997)

ORLEANS PARISH SCHOOL BOARD,

Plaintiff-Appellant,

versus

ASBESTOS CORP. LTD.; CELOTEX CORP.; ASBESTOS SPRAY CORP.; U.S. MINERAL PRODUCTS CO.; U.S. GYPSUM CO.; UNIDENTIFIED PARTIES; STANDARD INSULATIONS, INC.; SPRAY OF LAKE CO.; RUBEROID CO.; RAYMARK IND., INC.; RAYBESTOS MANHATTAN; PFIZER, INC.; OWENS CORNING; COLBERT LOWREY HESS & BOUDREAUX, INC.; NICOLET IND. INC.; NATIONAL GYPSUM COMPANY; LAKE ASBESTOS OF QUEBEC CO.; KEENE CORP.; HEDRICK & HOOTEN, INC.; H.K. PORTER CO., INC.; CAREY CAN MINES, LTD.; GEORGIA-PACIFIC CORPORATION; G.A.F. CORP.; FRERET & WOLF, INC.; FLINTKOTE CO.; FIBERGLASS CORP.; FIBERBOARD CORP.; CURTIS, INC.; AUGUST PEREZ & ASSOCIATES; EDWARD C. MATHES; HENRI M. FAVROT; MATHES BERGMAN FAVROT & ASSOCIATES; FRERET AND WOLF ARCHITECTS; ALBERT J. WOLF, JR.; JAMES P. OUBRE & ASSOCIATES; LEAKE ASSOCIATE ARCHITECTS; HAROLD E. PIQUE; ROBERT CUMMINS ASSOCIATE ARCHITECTS; MURVAN M. MAXWELL; J. BUCHANAN BLITCH; BURK & LAMANTIA ARCHITECTS, INC.; FAVROT, REED, MATHES & BERGMAN; ALBERT

J. SAPUTO; PARHAM & LABOUISSE; LOWREY, HESS, BOUDREAUX ARCHITECTS; MAXWELL & LEBRETON; ANTHONY J. GENDUSA; EDWARD MY TSOI; GRIMBALL, GRIMBALL, GORRONDONA, KEARNEY & SAVOYE; LLOYD ROSEN; ROCK & GALLOWAY ARCHITECTS; ERNEST E. VERGES & ASSOCIATES, INC.; LAWRENCE & SAUNDERS; LEAKE FRERET & WOLF; HENRY G. GRIMBALL; SPRAGUE & LAMP ASSOCIATES; THOMPSON B. BURK & ASSOCIATES ARCHITECTS; ARMSTRONG WORLD INDUSTRIES, FLOOR DIVISION, INCORPORATED; KENTILE FLOORS, INC.,

Defendants,

and

W. R. GRACE & CO.,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

Before POLITZ, Chief Judge, GOODWIN* and DUHÉ, Circuit Judges.

POLITZ, Chief Judge:

The Orleans Parish School Board (School Board) appeals an adverse summary judgment in its action to recover the costs of removing asbestos from school buildings. Concluding that the district court properly held that the School Board's claims against W.R. Grace & Co.-Conn. (Grace) had prescribed, we affirm.

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* Circuit Judge of the Ninth Circuit, sitting by designation.

BACKGROUND

In the late 1970s and early 1980s, school boards across the nation learned of the potential dangers of asbestos, the possibility of its presence in school buildings, and the expense of its removal. Motivated by this knowledge, in 1983 the school boards filed a national class action against numerous asbestos manufacturers. In 1988 the School Board opted out of the class action and filed suit in Louisiana state court against the same asbestos manufacturers, including Grace.

The School Board's action was removed to federal court and Grace moved for summary judgment, contending that the claims were subject to a one-year liberative prescription which had accrued before the filing of the national class action. The School Board countered by urging that its claims had not prescribed and, in the alternative, that La. R.S. 9:5644(c) revived otherwise prescribed claims against asbestos manufacturers. The district court agreed with Grace, entered summary judgment dismissing the action, and the School Board timely appealed.

ANALYSIS

We review a district court's entry of summary judgment *de novo* and apply the identical legal standards as the district court.[1] The district court's entry of summary judgment will be deemed appropriate if "the pleadings, depositions, answers to interrogatories, and admissions

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[1] *Songbyrd, Inc. v. Bearsville Records, Inc.*, 104 F.3d 773 (5th Cir. 1997).

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2]

We sit herein as an *Erie* court and apply the substantive law of the state of Louisiana.[3] The primary source of law in Louisiana is the Louisiana Civil Code; a secondary source is its jurisprudence.[4] We therefore consider first the Civil Code and then the decisions of the Louisiana Supreme Court in our determination of the validity vel non of Grace's limitations claim, in civilian terminology cognomened prescription.

Article 3492 of the Civil Code provides the applicable prescriptive period for the School Board's claims:

> Delictual actions are subject TO a liberative prescription of one year. This prescription commences to run from the day injury or damages is sustained. . . .

Within the realm of delictual actions against asbestos manufacturers, the Louisiana Supreme Court recently dispositively decided the time of the commencement of accrual of this one-year prescriptive period.

In *Cameron Parish School Board v. Acands, Inc.*[5] the Cameron Parish School Board sued asbestos manufacturers to recover the costs of removing asbestos from its school buildings. One manufacturer filed a peremptory

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[2] Fed.R.Civ.P. 56(c).

[3] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

[4] La. Civ. Code art. 1 and cmt.b.

[5] 687 So.2d 84 (La. 1997).

exception of prescription. Upon its review of the exception of prescription, Louisiana's highest state court noted that it is often difficult to identify the exact point in time that prescription begins to run. It held, however, that at the latest, prescription begins to run against a school board in a suit against an asbestos manufacturer when the school board becomes aware that asbestos is present in "at least some of its buildings" posing a health risk to employees, and that it must be removed at a considerable expense.[6]

Thus informed, we consider the timeliness of the instant claims. The School Board learned that it had asbestos in at least some school buildings in 1979 when, prompted by admonitions of the Environmental Protection Agency, it conducted a visual inspection of all of its school buildings, and collected 301 samples of building materials from six schools. It submitted 24 samples for laboratory testing which established the presence of asbestos in five of the schools.[7] Further, in a report entitled "Asbestos in New Orleans Public Schools A Status Report," the School Board reported that

> [a]ll schools, administrative buildings, and support service locations – 136 structures – were inspected visually for presence of asbestos with the following results:
> 99 schools with some friable materials, some of which could be asbestos

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[6] *Id.* at 89

[7] The School Board tested the remainder of the 301 bulk samples in 1981 and 1982.

> 20 locations with all asbestos-type material in good condition
> 17 sites with no asbestos-type material.[8]

In 1979 the School Board also learned of the potential health risks associated with asbestos. The EPA sent numerous documents detailing the dangers of asbestos to school boards across the nation. Of particular note, the School Board received a document entitled "School Asbestos Program Questions & Answers." In this document, the EPA explained that asbestos in school buildings was of great concern because "[e]xposure to asbestos fibers c[ould] cause debilitating or fatal diseases." The EPA also characterized asbestos as hazardous warning that

> [e]pidemiological studies of asbestos workers have shown that exposure to asbestos increases the risks of developing lung cancer, mesothelioma . . . and asbestosis. . . . EPA believes that any exposure to asbestos involves some increase of risk. No safe level of exposure or "threshold" level has ever been established. . . .

Finally, by 1980 the School Board knew that asbestos had to be removed from its school buildings and that the removal process was an expensive one. The 1979 status report explained that correction of the asbestos problem would begin after all of the bulk samples were tested. In addition, the report characterized the removal process as

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[8] This same information was contained in a report prepared by Dr. Samuel A. Scarnato, the Deputy Superintendent. The report was entitled "Asbestos In Schools," dated November 30, 1979, and distributed to both the Superintendent and the Members of the School Board.

complex and necessarily expensive. In 1980 the School Board prepared an "Asbestos Survey and Estimate" which reflected that the cost of removing asbestos would be approximately $5,000,000. That same year, the School Board began to remove asbestos from its school buildings.

Although from the record we cannot pinpoint the exact day that prescription began to run against the School Board, it is not necessary that such be done.[9] The record reflects beyond peradventure that the School Board knew by sometime in 1980 that asbestos was a serious problem and that it necessitated an extensive and expensive removal process. The one-year liberative prescription for delictual actions began to accrue against the School Board at that time. The School Board's claims were thus prescribed by the time the national class action lawsuit was filed in 1983.[10]

The School Board contends that even if its claims prescribed, they were revived by La. R.S. 9:5644(C).[11] We are not persuaded. This issue was decided conclusively in

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[9] *Cameron Parish.*

[10] The district court concluded that prescription began to run against the School Board in 1981. Even under this expansive reading of the facts, the School Board's claims were prescribed long before the filing of the national class action.

[11] La. R.S. 9:5644(C):

> Any person who has an action to recover for asbestos abatement work under the provisions of this Section but whose action is barred by the prescriptive period provided in R.S. 9:5644 shall have one year from the effective date of this Act within which to bring an action or be forever barred.

Cameron Parish in which the Louisiana court held that La. R.S. 9:5644(c) could not be retroactively applied to "claims as to which prescription has already accrued."[12] We act herein as an *Erie* court and this decision is dispositive of the School Board's argument. We therefore conclude and hold that the School Board's claims against Grace prescribed before the filing of any litigation which might have interrupted prescription and the claims were not revived by 9:5644(c), or any other statutory enactment.

The judgment appealed is AFFIRMED.

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[12] *Cameron Parish* at 92.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ORLEANS PARISH SCHOOL BOARD	**CIVIL ACTION**
VERSUS	**NO. 89-70**
UNITED STATES GYPSUM CO., et al.	**SECTION "H" (5)**

ORDER AND REASONS

(Filed June, ___ 1995)

The Motion to Review and Objection to Magistrate's Report and Recommendation with respect to the Motion for Summary Judgment on Prescription filed on behalf of W.R. Grace & Co. – Conn. ("Grace"), the only remaining defendant, was submitted on memoranda. For the following reasons, I respectfully reject the Magistrate's report and recommendation. I conclude that there is no genuine issue of material fact and that mover is entitled to summary judgment as a matter of law.

The defendant seeks to dismiss as prescribed the claim of plaintiff, Orleans Parish School Board ("School Board"). Defendant contends that the one year prescriptive period has run because the School Board had sufficient knowledge of asbestos in its school buildings to commence the running of prescription by 1981. No legal action was taken on behalf of the School Board until 1983, and this suit was not filed until 1988.

In 1979, the School Board became aware of the potential dangers of asbestos and its possible presence in its buildings. Triggered by the concern generated by the

Asbestos crisis faced by the New York City public schools and by the publications issued by the United States Environmental Protection Agency ("EPA"), in 1979 the School Board examined its building specifications to help identify locations which may contain asbestos, conducted a visual inspection of all of its buildings and facilities, and collected over three hundred bulk samples of suspected asbestos-containing materials ("ACMs") to test for asbestos. Because of budgetary constraints, only twenty-four of the samples, representing samples taken from six schools, were tested in 1979; those tests revealed asbestos in five schools. The School Board abated that asbestos in 1980. In 1980, the Board tested an additional fifty of the bulk samples, finding asbestos in thirty-seven of them. On March 23, 1981, the School Board adopted a resolution recognizing the dangerous presence of asbestos in its schools and the expensive need to abate it. In December, 1981, the remainder of the bulk samples were submitted for testing, pursuant to a state program for free testing of bulk samples taken from Louisiana public schools. By April, 1982, the School Board had received the results of these tests, which indicated that 117 of its 136 buildings contained asbestos.

On January 17, 1983, a class action ("national class action") was filed in the United States District Court for the Eastern District of Pennsylvania against Grace and many other asbestos manufacturers, on behalf of all of the nation's public school districts, including the public schools in Orleans Parish. On March 16, 1988, the School

Board opted out of this national class action.[1] On August 31, 1988, the School Board filed this suit against the same group of asbestos manufacturers, seeking to recover the costs incurred when it abated the ACMs. The Board alleges that ACMs manufactured by Grace were found in nineteen of its schools.

The magistrate recommended denying the motion for summary judgment on prescription, concluding that there was a question of material fact as to "when the damages became apparent to the Board" and that mover had not established as an undisputed fact that prescription had begun to run more than a year before the national class action was filed on January 17, 1983. The magistrate also recommended that this court find that the national class action filed in 1983 interrupted prescription. The magistrate's report does not address the defendant's contention that any interruption of prescription that occurred as a result of the national class action was nullified when the School Board opted out of it, or its contention that La. R. S. 9:5644(C) constitutionally could not revive the School Board's otherwise prescribed claims.

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[1] The notice informing all class members of the class action gave the members the right to opt out not later than December 1, 1987. (R.Doc. 431, exh. 4). By court order, the date was extended until March 17, 1988. (R. Doc. 431, exh. 5). Shortly before the extended date, the School Board opted out of the class action. (R. Doc. 431, exh. 6).

I. STANDARD OF REVIEW AND STANDARD FOR SUMMARY JUDGMENT

A magistrate's report and recommendation with respect to a dispositive motion is reviewed *de novo*. Summary judgment should be granted when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. "When the record – taken as a whole – could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue of material fact for trial." *Davis v. Chevron USA, Inc.*, 14 F.3d 1082, 1084 (5th Cir. 1994).

II. THE SCHOOL BOARD'S CLAIM WAS PRESCRIBED WHEN THE CLASS ACTION WAS FILED IN 1983 BECAUSE THE ONE YEAR PRESCRIPTIVE PERIOD FOR DELICTUAL ACTIONS BEGAN RUNNING BEFORE 1982.

In this diversity action, Louisiana's one year statute of limitations for delictual actions applies.[2] La. Civ. Code art. 3492 ("Delictual actions are subject to a liberative prescription of one year.").

Under Louisiana law, prescription begins to run "when the person in whose favor a cause of action exists knows or should have known [sic] of the existence of his cause of action." *Trizec Properties, Inc. v. United States Mineral Products Co.*, 974 F.2d 602, 607 (5th Cir. 1992); La.

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[2] The prescriptive period for redhibition [sic] claims is also one year, running from the date of discovery of the vice. La. Civ. Code art. 2546.

Civ. Code art. 3493 ("When damage is caused to immovable property, the one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage."). A person knows or should know of the existence of his cause of action once he has received sufficient notice to prompt a reasonable person toinvestigate further. *See Jordan v. Employee Transfer Corp.*, 509 So.2d 420, 423-24 (La. 1987).[3]

Because the exact date is uncertain, to that extent the magistrate is correct in the conclusion that there is a question as to "when the damages became apparent to the Board." However, the exact date is not a *material* fact, because no rational trier of fact could find that the School Board was not aware of the ACMs in its schools, the dangers posed by them, and the need to remove or abate them by the and of 1981, more than one year before the class action suit was filed.

In 1979, the EPA published a booklet entitled "School Asbestos Program: Questions and Answers," (R. Doc. 425,

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[3] The Magistrate relied on *Dean v. Hercules, Inc.*, which held that the prescriptive period begins to run "only from the date the damage [to the plaintiff's trees caused by emissions from the defendant's chemical plant] becomes apparent" because "prescription does not begin to run until the plaintiff knows or should know he has sustained damage." 328 So.2d 69, 73-74 (La. 1976). *Dean* uses different language to describe the same rule of law which I apply: prescription does not commence to run until a reasonable person would discover the facts giving rise to the cause of action. In *Dean*, the owner of the trees could not discover his cause of action until he could see the damage to his trees. Here, the School Board could have discovered its asbestos problem once it had a reason to investigate for it.

exh. 8), which the School Board received in the summer of 1979. R. Doc. 425, exh.9, pp. 16-17. The booklet explained the EPA's concern for the dangers posed by asbestos in the schools, especially friable ACMs that were usually sprayed on, and emphasized the likelihood that many public school buildings contained ACMs. It recommended that schools check building records, conduct a visual inspection of buildings, gather and test bulk samples of suspected ACMs,[4] and take any necessary corrective action.

Prompted by the problems faced by the New York City public schools and by the above-described EPA booklet, Dr. Scarnato,[5] the deputy superintendent of the School Board, testified that he began to "religiously" follow the EPA's suggested guidelines during the summer of 1979.

> We had blueprints and we had specifications on most of our buildings, the specifications from which contractors worked. And I asked them to go through those, and find anywhere where asbestos was specified, and then we would do a visual inspection of all of the schools, and we would also take bulk samples, and that is what we did in the summer of '79.* * *

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[4] The booklet emphasized the need to sample and test suspected ACMs, because some materials that look like ACMs do not contain asbestos.

[5] In his deposition, Dr. Scarnato stated that he became aware of the "monumental type of a problem" faced by the public schools in New York City through educational literature, and that he "felt anything that happens in New York, it is just a matter of time before it happens in New Orleans, so we'd better try to see what the story is." (R. Doc. 425, exh. 9, p.16).

> What we wanted to do was go back to the prints and to the building specifications we had and anywhere there was asbestos specified, we would note that and do a visual inspection, and we needed to determine, in fact, the condition of the asbestos, whether it was friable or solid, and secondly we were to take a sample of that, and . . . it had to be labeled, so we would know exactly where it came from.

R. Doc. 425, exh. 9, pp. 18, 139-40. The person in charge of collecting the samples was also instructed "to take samples of any material that he believed contained asbestos in the school." R.Doc. 425, exh. 10, p. 28.

During the visual inspection of all of its buildings and facilities, the School Board in 1979 collected 301 bulk samples of suspected ACMs to test for asbestos. Because of budgetary constraints, (*See, e.g.*, R. Doc. 425, exh. 9, p. 22-23), only twenty-four samples taken from six schools were tested during the summer of 1979; those tests revealed asbestos in five of the six schools (sixteen of the twenty-four samples). R. Doc. 425, exh. 6.

The July 18, 1979 "New Orleans Public Schools Asbestos Control Program Survey" detailed the findings of the visual inspection, including the location, condition (good or friable), and size (in footage) of the suspected ACMs, and the number and location of samples taken. R. Doc. 425, exh. 5. The November 30, 1979 "Asbestos in New Orleans Public Schools: A Status Report," which was prepared by Dr. Scarnato for the Superintendent, summarized the findings from the visual inspection:

> 1) All schools, administrative buildings, and support service locations – 136 structures –

were inspected visually for presence of asbestos with the following results:

99 schools with some friable materials, some of which could be asbestos

20 locations with all asbestos-type material in good condition

17 sites with no asbestos-type material

* * *

4) 301 bulk samples were taken from all sites with any suspected asbestos.

5) 24 of the bulk samples, representing six schools, were subjected to recommended quantitative and qualitative laboratory evaluation at a cost of $40 per sample. In about 60% of the samples, the presence of asbestos was either non-detectable or less than 10%.

6) Cost for testing the remaining samples by the two methods of laboratory analysis recommended by the Environmental Protection Agency is estimated at approximately $22,000.

7) Correction of asbestos problems . . . will commence only after completion of careful testing and planning. Cost cannot be estimated at this time; but the process is complex and necessarily expensive.

8) Further testing cannot take place until funds are made available.

R. Doc. 425, exh. 21. The November 30, 1979 report entitled "Asbestos in Schools," which was prepared by Dr. Scarnato and distributed to the Superintendent of the Schools and to the President and Members of the School

Board, notified the School Board of the extent of the asbestos problem faced by the New Orleans Public Schools:

> The problem [of asbestos in the schools] first surfaced during the last school year when the New York Public Schools were forced to spend millions of dollars to correct the asbestos problem and scare in their schools.
>
> * * *
>
> 1. Asbestos-containing materials are widely found in the building materials used in our schools.
>
> * * *
>
> 4. E.P.A. and the scientific community believe that any exposure to asbestos involves some health risk. However, they have not been able, at this point, to establish what is a safe level of exposure.
>
> 5. The method of defining the extent of the school asbestos problem is somewhat lengthy and costly. It involves visual inspection, sample techniques and a two-process laboratory analysis.
>
> * * *
>
> 3. The visual inspection report done this summer found the following:
>
> 17 schools with no asbestos
>
> 20 schools with all asbestos in good condition
>
> 99 schools with some friable materials, some of which could be asbestos.

R. Doc. 425, exh. 22. Dr. Scarnato testified that after these reports were prepared, "we believed we had a problem, absolutely." R. Doc. 425, exh. 9, p.43.

Not only did the School Board know that it had a serious problem with asbestos in its school buildings, but, by the summer of 1980, the School Board began abating the problem. By that summer, the School Board had either removed or encapsulated ACMs that were confirmed to contain asbestos by laboratory testing or where the ceilings were deteriorating. R. Doc. 425, exh. 9, pp. 141, 62-63.[6] In the June 30, 1980 "Asbestos Survey and Estimate," the School Board estimated that it would cost nearly $5,000,000 to abate the asbestos in the school by removal or encapsulation, excluding the cost of removing and replacing the structural steel fireproofing that contained asbestos. R. Doc. 425, exh. 31.

On February 23, 1981, the members of the School Board heard various presentations on the dangers of exposure to asbestos and the extent of asbestos in its schools. On March 23, 1981, they formally adopted a resolution which recognized the health threats posed by exposure to asbestos, that "substantial amounts of asbestos, particularly in sprayed form, have been used in school buildings," that "asbestos exposure presents a hazard in all schools and in all public buildings of the

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[6] Abatement of ACMs remained a priority for the School Board thereafter. *See* R. Doc. 425, exh. 42.

State of Louisiana," and the results of the visual inspection and the limited laboratory testing.[7] R. Doc. 425, exhs. 32-33.

In June 1981, the Board tested an additional fifty samples, discovering that thirty-seven of them had asbestos.[8] R. Doc. 425, exhs. 36-37. This information was forwarded to the Superintendent and to the President and Members of the School Board on July 10, 1981. R. Doc. 425, exh. 38. In December 1981, after the state of Louisiana provided for free laboratory testing of samples of suspected ACMs taken from Louisiana public schools, the School Board submitted the remaining samples plus some additional ones.

The minutes of the School Board meeting on March 14, 1983 include an observation by one of its members to the effect that "years ago" the board had authorized David Berger, class counsel in the national class action, to include it in any class action which he would file. This provides further proof that more than a year elapsed between the Board's decision to join a planned class action and the filing thereof in January of 1983.

Thus it is clear that the one year prescriptive period for this action began to run more than a year before the national class action was filed in 1983. In 1979, put on notice that it may have a problem with asbestos in its schools, the School Board undertook an extensive visual

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[7] The resolution sought Congressional and state funding.

[8] The plaintiff concedes that at this point, it knew it had asbestos in four of the nineteen schools still at issue in this litigation. (R. Doc. 453, p.5).

inspection of all of its buildings and facilities, during which it detailed the location of suspected ACMs. That same year, laboratory testing of some of the samples confirmed that many of them actually contained dangerous asbestos fibers. In March 1981, the School Board adopted a resolution publicly acknowledging the dangers posed by asbestos exposure, the "substantial amounts" of sprayed asbestos in its schools, and the hazards posed by them.

The School Board contends that prescription does not commence running until a person can identify the likely responsible party. While prescription "[does] not begin to run until a person has a reasonable basis to pursue a claim against a specific defendant," *Jordan*. 509 So.2d at 424, once the facts giving rise to a cause of action are apparent, "the plaintiff must exercise reasonable diligence in ascertaining the identify of the party injuring him." *Dean v. Hercules, Inc.*, 328 So.2d 69, 75 (La. 1976). "It is often possible through investigation, architect or contractor recollection, plans and specifications, or state archives, to ascertain the identify of the manufacturers of the asbestos product used in a particular school." R. Doc. 425, exh. 48, p. X. Once the School Board knew that it had an asbestos problem, it could have begun to identify the asbestos manufacturers within a brief time thereafter through reasonable diligence. The board had in its possession at least some[9] of the building specifications, blueprints, and records which identified at least some of the

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[9] The School Board admits that it had specifications for three of the nineteen schools still at issue in this litigation. R. Doc. 431, p.10.

asbestos manufacturers; it used those materials to help plan its 1979 visual inspection of its schools. To allow the board's failure to use reasonable diligence to identify the asbestos manufacturers to toll the running of prescription would be tantamount to allowing plaintiff to choose when to file suit without regard to the laws of prescription. *See Trizec*, 974 F.2d at 607 ("[A]ctual notice is generally sufficient to place a reasonable person on notice of the existence of a cause of action against a specific person and to start the running of the prescriptive period."); *Jordan*, 509 So.2d at 423 ("[A] plaintiff will be responsible to seek out those whom he believes may be responsible for a specific injury."); *Dean*, 328 So.2d at 75 ("[T]he plaintiff must exercise reasonable diligence in ascertaining the identity of the party injuring him.").[10]

The School Board also contends that the prescriptive period did not begin to run until it confirmed through laboratory testing in 1982 the existence of asbestos in *each* of the nineteen schools still at issue in this litigation. To the contrary, under Louisiana law, the prescriptive period begins to run once a person has knowledge sufficient to provoke an inquiry as to the extent of damage; the injured person does not need detailed knowledge of the extent of damage. *See Jordan*, 509 So.2d at 423-24 ("When prescription begins to run depends on the reasonableness of a plaintiff's action. . . . [P]rescription did not begin to run until they had a reasonable basis to pursue a claim

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[10] The School Board has not shown that it had any additional information on the identify of the ACM manufacturers in 1988 than it had in 1979.

against a specific defendant."; "A plaintiff will be responsible to seek out those whom he believes may be responsible for a specific injury."); *Dean*, 509 So.2d at 73 (in a suit involving damage to property caused by chemical emissions, prescription begins to run "from the date the damage becomes apparent"). Once the School Board became aware that it had an asbestos problem in 1979, it undertook an extensive visual inspection of every one of its buildings, taking samples of suspected ACMs. This survey, which found suspected ACMs in eighteen of the nineteen schools still at issue, R. Doc. 455, p.17 n.46, was sufficient to commence the running of prescription for all the buildings, even if suspected ACMs were not found in each building.

Moreover, the Board did more than just inspect the schools. It tested twenty-four of those samples, confirming that it had asbestos in at least three of the nineteen schools still at issue in this litigation. R. Doc. 425, p. 12-15. By the summer of 1980, it had removed or encapsulated the confirmed ACMs. By the summer of 1981, it had laboratory confirmation that it had ACMs in six of the nineteen schools still at issue. R. Doc. 453, p. 9. The confirmation that it had ACMs in its schools and the commencement of abatement activity show more than sufficient knowledge to commence the running of prescription for all the schools. Prescription was not tolled while the School Board waited until 1982 to spend $22,000 to test the samples. R. Doc. 425, exh. 21. Not later than the end of 1981, the School Board had publicly acknowledged that it had an asbestos problem in its schools, and it had already ~~begun abating it. The School Board could not~~

wait and choose when prescription would begin to run by pleading financial hardship.[11]

Because the School Board knew about the presence of asbestos in its schools, knew of the health hazards created by exposure to asbestos, and could have easily identified the asbestos manufacturers through use of reasonable diligence by the end of 1981, School Board's claims were prescribed when the national class action was filed in January, 1983.[12]

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[11] Because prescription commenced running for all the buildings after the visual inspection, laboratory testing, and asbestos removal, it is not necessary to reach the issue of whether the School Board has a separate cause of action with a separate prescriptive period for each of its buildings.

[12] The School Board also makes the spurious contention that prescription did not commence to run before the national class action was filed because it did not know that the asbestos in its school was hazardous. While there may have been scientific uncertainty as to the level at which asbestos exposure becomes harmful (ultimately, the scientific community concluded that any level of exposure was hazardous), the School Board publicly acknowledged that the ACMs in its schools posed a health hazard in its March 1981 resolution. In addition, by encapsulating or removing confirmed ACMs and suspected ACMs in deteriorating ceilings and by estimating the cost of abating all the suspected ACMs, it showed knowledge that the materials were hazardous and had to be abated. Therefore, the scientific uncertainty as to the exact level of exposure that is deemed harmful did not toll the running of prescription.

III. THE LOUISIANA ASBESTOS PRESCRIPTION REVIVAL STATUTE

A Louisiana statute enacted in 1985 (effective September 6, 1985) deals specifically with prescription of actions involving asbestos abatement:

> Notwithstanding any other provision of law to the contrary, any time limitation or prescriptive period which may be applicable to any action to recover for asbestos abatement work shall not apply or expire until five years after the date on which the party seeking to recover has completed the abatement work or discovered the identity of the manufacturer of the materials which require abatement, whichever is later.

La. R.S. 9:5644(B). This statute does not create a prescriptive period for asbestos abatement suits; it merely suspends the one year period generally applicable to *ex delicto* actions. *Trizec Properties, Inc. v. United States Mineral Products, Co.*, 974 F.2d 602, 606 (5th Cir. 1992). As a suspensive statute, it has no effect upon an action which prescribed before its effective date. *Id.* Because the prescriptive period as to the Board's cause of action had already expired when the statute became effective, subsection B is not applicable.

To avoid prescription, the School Board contends that subsection C of the 1985 statute revives its otherwise prescribed action:

> Any person who has an action to recover for asbestos abatement work under the provisions of this Section but whose action is barred by the prescriptive period provided in R. S. 9:5644 shall have one year from the effective date of this Act

> [September 6, 1985] within which to bring an action or be forever barred.

La. R. S. 9:5644(C). Observing that "[t]his subsection is far from a model of clarity," *Trizec* concludes that the language "barred by the prescriptive period provided in R. S. 9:5644" refers to the one year prescriptive period provided by Louisiana Civil Code articles 3492 and 3493. *Trizec*, 974 F.2d at 607-08. Thus the beneficiary of the revival grant of subsection C must exercise the grant by filing suit no later than September 6, 1986. The instant suit was filed in 1988. Therefore, even if subsection C is applicable, to avoid defendant's prescription plea, the School Board must demonstrate that the running of the one-year revival period in subsection C was interrupted or suspended prior to September 6, 1985.

IV. THE CLASS ACTION OPT OUT

The one-year revival period was interrupted by the pendency of the national class action lawsuit. Under Louisiana law, prescription is interrupted by the timely commencement of an action, and that interruption continues for as long as the suit is pending; once the interruption ceases, prescription commences to run anew. La. Civ. Code arts. 3462, 3463, 3466. This principle applies to class action lawsuits. *Williams v. State of Louisiana*, 350 So.2d 131, 137 (La. 1977) ("[S]ince the class action is brought on behalf of all members of the class, its filing interrupts prescription as to the claims of all members of the class, whether they are noticed before or after the prescriptive delay has terminated."). Defendant contends that the national class action filed in 1983 is of no avail to the

School Board, because the class action was not filed within "one year from the effective date" of the 1985 statute. La. R.S. 9:5644(C). This literal interpretation of the revival statute has merit. *See Concordia College Corp. v. W.R. Grace & Co.*, 999 F.2d 326, 331-32 (8th Cir. 1993). However, I conclude that the pendency of the class action subsequent to the effective date of the 1985 statute has the same effect under Louisiana law as if a new class action had then been brought. The fact that the School Board's claim in the national class action was prescribed prior to the enactment of the 1985 statute is of no consequence; because the board's claim had not been dismissed as prescribed, the action was pending within "one year from the effective date of this Act." La. R.S. 9:5644(C).

Although the national class action effectively interrupted prescription on this claim, the effect of that interruption was lost to the School Board when it chose to opt out of the class action. A plaintiff loses the benefit of interruption by suit when he voluntarily dismisses the suit; "[i]nterruption [of prescription] is considered never to have occurred if the plaintiff . . . voluntarily dismisses" the suit. La. Civ. Code art. 3463. When a case is voluntarily dismissed, the action is treated as if it had never been filed. "The prescriptive period, therefore, is not tolled by the bringing of an action that is later voluntarily dismissed." *Taylor v. Bunge Corp.*, 775 F.2d 617, 619 (5th Cir. 1985).

In *Roger v. Estate of Moulton*, the Louisiana Supreme Court concluded that when the plaintiff dismisses a suit after the defendant has made a general appearance, the interruption is nonetheless effective. 513 So.2d 1126, 1133

(La. 1987). After a general appearance by defendant, when plaintiff moves to dismiss, the trial court has discretion to dismiss the suit with prejudice. The Louisiana Supreme Court reasoned that such a situation is not a "voluntar[y] dismiss[al]." *Id.* at 1133.[13] The School Board argues that the *Roger* reasoning is applicable here, because prior to the board's opt out, defendant had made a general appearance in the class action. Had the interruption by the class action not been nullified by the opt out, the instant suit filed within one year from the date of the opt out would have been timely.

However, opting out of a class action differs from the situation described in *Roger* because opting out does not involve any exercise of discretion by the court. A party who requests exclusion from the class "voluntarily dismisses" the class action insofar as that opting out party is concerned. The court does not have discretion to dismiss that person's claim with prejudice; it only excludes him from the final judgment. Fed. R. Civ. P. 23(c) (2) ("The notice shall advise each member that (A) the court will exclude the member from the class if the member so

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[13] Revision Comment (b) to La. Civ. Code art. 3463 indicates that the filing of suit followed by a dismissal without prejudice has some effect upon the statute of limitations. If the commentator means to refer to a voluntary dismissal by plaintiff prior to a general appearance by defendant, this comment contradicts the clear language in article 3463 to the contrary. Needless to say, the code article is law, not the comment:

> [T]he comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.

1982 La. Act No. 187, § 6.

requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion. . . . "). To opt out, the School Board only had to send a notice of exclusion to the clerk of court. (R. Doc. 431, exh. 6) (letter from clerk of court notifying class counsel that the School Board had requested exclusion from the litigation). Under Louisiana law, that notice constituted a voluntary dismissal of the board's class action; therefore, "interruption [of prescription] is considered never to have occurred." La. Civ. Code art. 3463.

Opting out of a class action is analogous to the situation presented in *Plaisance v. Loop, Inc.*, 499 So.2d 736 (La. Ct. App. 4th Cir. 1986), *writ denied*, 503 So.2d 23 (La. 1987). In *Plaisance*, the court held that prescription did not begun to run anew after the plaintiff voluntarily dismissed a suit without the consent of the defendants, because "voluntary dismissal should not be used to . . . forum shop[]." *Id.* at 738 (stating that article 3519 (presently, the pertinent part of article 3463) "clearly applies.").[14]

By opting out of the national class action, the School Board lost any benefit it gained by being in the class,

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[14] In *Cameron Parish School Board v. Acands, Inc.*, the court held that previously filed class action suit served to preserve the plaintiff's revived claim, even though plaintiff opted out of the class action and filed its own suit nine months later. 646 So.2d 976, 980 (La. Ct. App. 3rd Cir. 1994), *writ denied*, 651 So.2d 846 (La. 1995). However, *Cameron Parish* did not address the issue raised here, i.e. whether opting out is analogous to a voluntary dismissal.

because opting out of a class action lawsuit, like voluntarily dismissing a suit without the consent of the defendant, is a unilateral, voluntary action by the plaintiff that allows the plaintiff to forum-shop. By opting out of the national class action in 1988, the School Board voluntarily and unilaterally chose to cease being a part of litigation that had been ongoing for five years so that it could bring suit in a court of its own choosing. Under Louisiana law, the class action is considered as if it was never filed. The School Board must accept the consequences of its untimely action; its intention to continue the litigation in a new forum is irrelevant.[15] The national class action was filed after the School Board's claim was prescribed. At most, the revival statute gave the School Board one year from September 6, 1985 to decide whether to remain in the national class action with its revived claim or to opt out of the class action and file its own, separate litigation in a forum of its choice. Because plaintiff waited until 1988 to file this suit, its cause of action is prescribed.

In cases dealing with the effect of denial of a class certification upon the suspension of a statute of limitations, the Supreme Court has held that

> '[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have

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[15] The plaintiff correctly contends that the purpose of the notice of the right to opt out is to give individual class members the opportunity to pursue their own claims for personal monetary relief. However, in so doing, the opting-out party assumes the risk that the applicable statute of limitations bars his action.

> been parties had the suit been permitted to continue as a class action.' Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.

Crown, Cork & Seal Co., Inc. v. Parker, 103 S.Ct. 2392, 2395 (1983) (citing *American Pipe & Construction Co. v. Utah*, 94 S.Ct. 756, 766 (1974)). To protect the efficacy and economy of class action litigation and prevent "a needless multiplicity of actions," *id.* at 2395-96, the running of prescription is tolled[16] for all putative members when the class action is filed, at least until the court decides whether to certify the class.

A substantial question exists as to whether under federal law the tolling benefits members of a federal class action who opt out. In *dicta*, the Court has twice suggested that a person who opts out of a class action may nevertheless benefit from the tolling. In *Eisen v. Carlisle & Jacquelin*, the Court held that Federal Rule of Civil Procedure 23(c) (2) requires individual notice to all class members who can be identified through reasonable effort of their right to opt out and, if they do not opt out, that

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[16] In *Chardon v. Fumero Soto*, the Court explained the difference between "tolling" and the "tolling effect." 103 S.Ct. 2611 (1983). "Tolling" means that "during the relevant period, the statute of limitations ceases to run," while the "tolling effect" refers to whether the limitations period is merely suspended or begins to run anew once the tolling ends. *Id.* at 2613 n.1.

they will be bound by the court's judgment. 94 S.Ct. 2140, 2150-52 (1974). The following footnote *dicta* is pertinent:

> Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah*, which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

94 S.Ct. at 2152 n. 13. In *Crown, Cork*, the Court discussed *Eisen*:

> *Eisen*'s notice requirement was intended to inform the class member that he could 'preserve his opportunity to press his claim separately' by opting out of the class. The *Eisen* court . . . concluded that the right to opt out and press a separate claim remained meaningful because the filing of the class action tolled the statute of limitations under the rule of *American Pipe*.

Crown, Cork, 103 S.Ct. at 2396 (citations omitted).

The Fifth and the Eighth Circuits have questioned the Supreme Court *dicta*, to the effect that prescription is tolled during the pendency of a class action for a plaintiff who opts out. In *Wood v. Combustion Engineering, Inc.*, the Fifth Circuit noted that "there appears to be a very real controversy as to whether *Eisen* extends *American Pipe* to situations in which a class action member opts out and files separate suit." 643 F.2d 339, 346 (5th Cir. 1981). In *Concordia College Corp. v. W.R. Grace & Co.*, the Eighth Circuit stated,

> There is some question whether a putative class member can enjoy the benefits of tolling merely by opting out, even though the class action is still pending. The Supreme Court, in *dicta* has intimated as much, even though that is not the language of *American Pipe* or *Crown, Cork & Seal.*

999 F.2d 326, 332 n.6 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 926 (1994). *But see Adams Public Sch. Dist. v. Asbestos Corp., Ltd.*, 7 F.3d 717, 719 n.1 (8th Cir. 1993) ("The fact that this participation ended with a decision to 'opt out' rather than with denial of class certification is irrelevant to the applicability of the *American Pipe* rule."); *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985) (holding that limitations period "begins running anew from the date when the class member exercises the right to opt out because before this time, the class member is deemed to be actively prosecuting her rights.").

In this diversity suit, a federal court must follow state substantive law, including a state statute of limitations, as long as it does not directly conflict with federal law.[17] *Erie R. Co. v. Tompkins*, 58 S.Ct. 817 (1938); *Guaranty Trust Co. v. York*, 65 S.Ct. 1464 (1945) (state statute of limitations are considered substantive for the purposes of *Erie* analysis). In *In re Agent Orange Product Liability Litigation*, the Second Circuit stated,

> The limitations periods of *American Pipe* and *Crown, Cork* were derived from federal statutes.

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[17] The three relevant Supreme Court cases involved federal question jurisdiction. *Crown, Cork*, 103 S.Ct at 2394 (Title VII employment discrimination); *Eisen*, 94 S.Ct. at 2144 (federal securities and antitrust laws); *American Pipe*, 94 S.Ct. at 760 (federal anti-trust laws).

> Here, we are dealing with Hawaii's limitation statutes. Because none of them provide for tolling in a situation such as exists here, it is doubtful that either *American Pipe* or *Crown, Cork* can be treated as applicable precedent.

818 F.2d 210, 213 (2d. Cir. 1987), *cert. denied*, 108 S.Ct. 695 (1988). *But see Adams Public Sch. Dist.*, 7 F.3d at 719 ("[W]e view the federal interest here as sufficiently strong to justify tolling in a diversity case when the state law provides no relief."). In my view, state law governs the effect to be given to an opt out vis a vis a state statute of limitations.

For reasons already stated, I conclude that the Louisiana Supreme Court would decide that the effect of an opt out of a class action is to nullify the interruption of prescription. Allowing the School Board to rely on the national class action from which it opted out to toll the revival period would be tantamount to promoting the very inefficiency, multiplicity of actions, and forum shopping that the class action procedure was designed to avoid. *See* Note, *Statutes of Limitations and Opting Out of Class Actions*, 81 Mich. L. Rev. 399, 428-31 (1982).

V. ALTERNATIVELY, LOUISIANA R.S. 9:5644(C) CONSTITUTIONALLY COULD NOT REVIVE AN OTHERWISE PRESCRIBED ACTION.

Defendant argues that applying subsection C of the 1985 revival statute, Louisiana R.S. 9:5644(C), to an action already prescribed on the effective date of the statute would violate the Louisiana constitution. I agree, and I grant defendant's motion for summary judgment on this

alternative basis. I have concluded that the School Board's claim is prescribed even if the 1985 statute can constitutionally be applied. Nevertheless, for the sake of completeness, I reiterate my view expressed in 1992 that the Louisiana Supreme Court would agree with defendant's contention. *City of New Orleans v. W.R. Grace & Co. – Conn.*, 1992 WL 125371 (E.D. La. 1992) (holding that, in reference to La. R.S. 9:5644(B), "[o]nce a plaintiff's case of action is barred by liberative prescription it cannot [under the Louisiana constitution] be revived by a subsequent legislative enactment"),[18] *aff'd*, 985 F.2d 558 (5th Cir. 1993) (affirmed on other grounds in an unpublished opinion).

Under Louisiana law, the running of prescription gives the party in whose favor prescription has run the substantive right to plead the exception of prescription. *Chance v. American Honda Motor Co., Inc.*, 635 So.2d 177,

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[18] Neither the Louisiana Supreme Court nor the United States Fifth Circuit Court of Appeal has decided this precise issue.

The Louisiana Supreme Court has confronted the issue of retroactive application of a change in other prescription statutes several times in recent years. In one of these cases, *White v. West Carroll Hosp., Inc.*, dealing with prescription of medical malpractice claims, the Louisiana Supreme Court pointed out that the case

> attracted the attention of several amici. * * * Amici have an indirect interest in the outcome of this litigation because they are involved in federal litigation in which the retroactive application of the asbestos abatement statute, La. R.S. 9:5644, is at issue.

613 So.2d 150, 153 n.8 ((La. 1992). *See also Wimberly v. Gatch*, 635 So.2d 206, 210 n. 10 (La. 1994); *Chance*, 635 So.2d at 178.

178 (La. 1994). "Because the defendant acquires the right to plead the exception of prescription, a change in that right constitutes a substantive change in the law as applied to the defendant." *Id.* at 178 (citing *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 817 (La. 1992) ("Substantive laws either establish new rules, rights, and duties or change existing ones."). *See also Cameron Parish Sch. Bd.*, 646 So.2d at 979 ("[W]e recognize that a defendant's right to assert the peremptory exception of prescription is a vested right.").[19]

The due process clause of the Louisiana constitution prohibits the revival of a prescribed cause of action.[20] Because the School Board's cause of action was prescribed long before the national class action was filed, it could not be revived by subsection C of the 1985 statute, La. R.S. 9:5644(C).

"Statutes of limitations . . . cannot consistently with [the due process guarantees in the] state [ ] constitution[ ] apply retroactively to disturb a person of a pre-existing right." *Lott v. Haley*, 370 So.2d 521, 523-24 (La. 1979)

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[19] *Cameron Parish Sch. Bd.* did not address the constitutionality of 9:5644(C), because none of the parties questioned it. 646 So.2d at 980.

[20] In *Chase Securities Corporation v. Donaldson*, the Supreme Court held that statutory revival of a time-barred cause of action does not violate the federal constitution's due process protection. 65 S.Ct. 1137, 1141 (1945). However, it stated that many state courts "have, as they are privileged to do, so interpreted their own easily amendable constitutions to give [their own due process] clauses a more rigid interpretation . . . " *Id.* at 1141-42 and n.9.

(refusing to apply a shortened prescriptive period retroactively, because it would divest a plaintiff of his vested right to his cause of action). "In Louisiana, the lapse of time necessary to prescribe vests a right in the party in whose favor it has run." *Ayo v. Control Insulation Corp.*, 477 So.2d 1258, 1260 (4th Cir. 1985), *writ denied*, 481 So.2d 1349 (La. 1986); *Chance*, 635 So.2d at 178.

As a vested right, the substantive right to plead prescription cannot be divested or disturbed without violating the Louisiana constitution's guarantee of due process of law.[21] *See Gay v. C&D of Shreveport*, 645 So.2d 280, 282 (La. Ct. App. 2d Cir. 1994) ("Retroactive application of a prescriptive provision is foreclosed when the cause of action has prescribed before the provision takes effect."); *L.V. v. Liberto*, 612 So.2d 812, 816 n.4 (La. Ct.

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[21] The defendant wrongly contends that the running of prescription extinguishes the underlying civil obligation, relying on *Louisiana Health Service and Indemnity v. McNamara*, 561 So.2d 712 (La. 1990). *See also Chance*, 635 So.2d at 180 (J. Hall concurring) (stating that considering the right to plead prescription to be a vested right is "consistent with the civilian teachings that the effect of the running of prescription is to extinguish the underlying obligation"). However, in *Louisiana Health Service and Indemnity v. Tarver*, the Louisiana Supreme Court corrected itself, emphasizing that the Civil Code article 3447 states that "[l]iberative prescription is a mode of barring of actions as a result of inaction for a period of time" and that "the language of the 1870 code [liberative prescription being a manner of discharging debts and a peremptory and perpetual bar] *'is not accurate and has not been reproduced in this [1982] revision.'* " 635 So.2d 1090, 1097 (La. 1994) (emphasis added by La. Sup. Ct.). Therefore, the running of liberative prescription bars the action but does not extinguish the underlying obligation.

App. 1st Cir. 1992) ("Prescription, having already accrued in favor of the school board, is a vested right for this defendant that may not be divested by a retroactive application of the amendment."). Because the right to plead prescription vested once prescription ran, Louisiana R.S. 9:5644(C) could not revive it. *Hall v. Hall*, 516 So.2d 119, 120 (La. 1987) ("The enactment of that [codal] article could not revive the already prescribed action."); *Chance*, 635 So.2d at 180 (J. Hall concurring); *Ayo*, 477 So.2d at 1260-61 (amendment to prescriptive statute could not revive already prescribed claims, because "liberative prescription laws, . . . , cannot apply retrospectively to disturb a person of a preexisting right").

VI. CONCLUSION

I grant defendant's motion for summary judgment on two grounds:

1. Even if subsection C of the 1985 Louisiana revival statute applies, prescription has run because the School Board opted out of the class action;

2. Alternatively, applying subsection C of the 1985 statute to the otherwise already prescribed claim would offend the Louisiana constitution.

June 5, 1995

/s/ Illegible

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ORLEANS PARISH SCHOOL BOARD	CIVIL ACTION NO. 89-0070
VERSUS	SECTION "H"
UNITED STATES GYPSUM COMPANY, ET AL	

ORDER AND REASONS

(Filed Mar. 26, 1990)

The motion for leave to amend complaint and the motion to remand filed on behalf of plaintiff, Orleans Parish School Board, were considered this date on memoranda. For the following reasons, both motions are DENIED.

On August 31, 1988, plaintiff filed suit in state court naming twenty-three manufacturers, thirteen contractors, and five architects as defendants. All of the manufacturer defendants were alleged to be citizens of states other than Louisiana, while all of the contractor and architect defendants were alleged to be citizens of Louisiana. The contractor defendants were named only as defendants "A, B, C, D, E, F, G, H, I, J, K, L and M."

On January 6, 1989, prior to service on any of the defendants, National Gypsum Company, one of the manufacturer defendants, removed the suit based on diversity of citizenship. Although the contractor and architect defendants were alleged to be citizens of Louisiana, National Gypsum claimed that they were fraudulently joined; therefore, complete diversity existed. Since the

date of removal, the parties have engaged in extensive discovery and have participated in numerous status conferences.

Plaintiff now seeks to amend its complaint to name an additional twenty-seven non-diverse architects as defendants and to have the action remanded back to state court.

MOTION TO AMEND COMPLAINT

Plaintiff seeks to amend its complaint to add an additional twenty-seven non-diverse architect defendants. The applicable statute provides that "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. §1447(e).

In *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987), the Fifth Circuit set forth the principles to be applied to determine whether the court should allow an amendment to add non-diverse defendants, requiring the suit to be remanded. There are three prime considerations: "the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, [and] whether plaintiff will be significantly injured if amendment is not allowed. . . . " *Id.* at 1182.

Plaintiff fails all three tests: it is apparent that the purpose of the proposed amendment at issue is to defeat federal jurisdiction; plaintiff has been dilatory in waiting over a year from the date that the suit was removed to

file its motion for leave to amend complaint; and plaintiff will not be significantly injured if amendment is not allowed. Plaintiff is free to file suit against the additional architects in state court. We exercise the discretion given to us by 28 U.S.C. § 1447(e) and deny plaintiff's motion for leave to amend.

MOTION TO REMAND

Plaintiff argues that because all defendants did not join in the removal petition, they are now procedurally barred from doing so, and they have no right to oppose the motion to remand. Plaintiff chose not to serve any of the defendants after filing suit in state court, and National Gypsum Company removed the suit before any of the defendants were served.

Only properly joined defendants who are served at the time the removal petition is filed must join in it. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 59 S.Ct. 347 (1939). Defendants who are not served at the time the removal petition is filed need not join in it. *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1261 n.9 (5th Cir. 1988). Unserved defendants can either accept removal by doing nothing or, after they are served, can move to remand pursuant to 28 U.S.C. § 1448. *Id.* at 1262-63. In the instant case, no defendant has objected to removal.

Moreover, even if there were any procedural defects in the removal procedure, plaintiff has waived its right to complain of such defects. The failure of all defendants to join in the removal petition is considered a procedural defect. *Id.* at 1263; *Johnson v. Helmerich & Payne, Inc.*, 892

F.2d 442 (5th Cir. 1990); *Santa Rosa Medical Center, Inc. v. Converse of Puerto Rico, Inc.*, 706 F.Supp. 111 (D.P.R. 1988). 28 U.S.C. § 1447(c) provides, in pertinent part, "A motion to remand the case on the basis of any defect in the removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a)." In the instant case, plaintiff waited nearly a year before filing its motion to remand.

Plaintiff also argues that the presence of the fictitiously named contractor defendants in its state court petition defeats diversity and compels remand. 28 U.S.C. § 1441(a) was recently amended to state, in pertinent part, "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."

While the amendment to 28 U.S.C. § 1441(a) became effective after plaintiff filed its state court petition, the amendment has uniformly been retroactively applied to cases pending when the amendment took effect. *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989); *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416 (9th Cir. 1989); *Cowan v. Central Reserve Life of North America Insurance Co.*, 703 F.Supp. 64 (D. Nev. 1989). We apply the statute and disregard the fictitiously named contractor defendants in determining that complete diversity exists.

Finally, plaintiff argues that the suit should be remanded, contending that the architect defendants named in the state court petition were not fraudulently joined.

Until it filed its remand motion, plaintiff never took issue with the allegation in the removal petition that the

architects were fraudulently joined. Instead, plaintiff engaged in extensive discovery, participated in status conferences, and waited almost a year to file its remand motion. In so doing, plaintiff has tacitly conceded that the architect defendants named in the state court petition were fraudulently joined. We conclude that such participation in this court constitutes a waiver of plaintiff's right to contest defendants' claim of fraudulent joinder. *See Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422 (5th Cir. 1990); *Harris v. Edward Hyman Co.*, 664 F.2d 943 (5th Cir. 1981) (per curiam).

As an additional basis for ignoring for diversity purposes the "architect defendants", all of which are allegedly corporations, we note that it is undisputed that not one of those named in the state court petition actually exists.

New Orleans, Louisiana, this 26th day of March, 1990.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 22 1997
CLERK

(2)

No. 97-326

In The
Supreme Court of the United States
October Term, 1997

ORLEANS PARISH SCHOOL BOARD,
Petitioner,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED

Whether this Court's limitation on the *Ex parte Young* exception to sovereign immunity articulated in *Idaho v. Coeur d'Alene Tribe of Idaho,* ___ U.S. ___, 117 S.Ct. 2028 (1997), and this Court's discussion of sovereign status in the context of a Tenth Amendment analysis in *Printz v. United States,* ___ U.S. ___, 117 S.Ct. 2365 (1997), warrant overturning the precedents of the United States Fifth Circuit Court of Appeals in *Minton v. St. Bernard Parish School Board,* 803 F.2d 129 (5th Cir. 1986) and *Moore v. Tangipahoa Parish School Board,* 594 F.2d 489 (5th Cir. 1979), that Louisiana parish school boards are not "arms" or "alter egos" of the State.

LIST OF RELATED PARTIES

W.R. Grace & Co.-Conn. is the respondent and only remaining defendant herein. In accordance with Supreme Court Rule 29.6, respondent states as follows:

1. W.R. Grace & Co. is the parent company of W.R. Grace & Co.-Conn.

2. W.R. Grace & Co.-Conn.'s nonwholly owned subsidiaries are:

a. A-1 Bit & Tool Co., Inc.
b. Alewife Boston Ltd.
c. Amicon, Inc.
d. Auragen, Inc.
e. CCHP, Inc.
f. Circe Biomedical, Inc.
g. Coalgrace, Inc.
h. Coalgrace II, Inc.
i. Five Alewife Boston Ltd.
j. GEC Management Corporation
k. GN Holdings, Inc.
l. GPC Thomasville Corp.
m. Gloucester New Communities Company, Inc.
n. Grace A-B Inc.
o. Grace A-B II, Inc.
p. Grace Drilling Company
q. Grace H-G Inc.
r. Grace H-G II Inc.
s. Grace Offshore Company
t. W.R. Grace Capital Corporation
u. Gracoal, Inc.
v. Gracoal II, Inc.
w. Homco International, Inc.
x. Woolwich Sewer Company, Inc.
y. Woolwich Water Co., Inc.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent requests the Court to deny the petition for writ of certiorari, which seeks a ruling on an issue never previously raised by petitioner in the eight years since this case was removed to federal court.[1] After all of petitioner's claims against respondent were dismissed by the United States Court of Appeals for the Fifth Circuit as time barred under the applicable Louisiana statute of limitations, petitioner, a Louisiana parish school board, contends for the first time that it is an "arm" of the State entitled to Eleventh Amendment immunity from having its claims adjudicated in federal court.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States* by Citizens of another State, or by Citizens or Subjects of any Foreign State.[2]

The Eleventh Amendment prohibition of federal jurisdiction over a suit "commenced or prosecuted against one of the United States" has no application to a lawsuit *brought by* a Louisiana parish school board. Moreover, petitioner neglects to inform the Court that the United States

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1 On September 12, 1997, respondent was granted a 30-day extension of time within which to file this brief in opposition to the petition for writ of certiorari.

2 U.S. Const. amend. XI (emphasis added).

Court of Appeals for the Fifth Circuit, in at least two cases decided in 1979[3] and 1986,[4] consistently has held that Louisiana parish school boards are not eligible for Eleventh Amendment immunity because they are not "arms" or "alter egos" of the State. The Fifth Circuit based its decisions in both cases on the criteria articulated by this Court in the leading case on the eligibility of a political subdivision for Eleventh Amendment immunity, *Mt. Healthy City School District v. Doyle,*[5] a case cited by petitioner as controlling this case. If *Mt. Healthy* controls this case, then so do the directly applicable Fifth Circuit precedents that were decided on the basis of *Mt. Healthy*, and that petitioner did not see fit to challenge in two previous hearings of this case by the Fifth Circuit itself. Nor does petitioner directly challenge the Fifth Circuit precedents in its petition to this Court. Petitioner does not even cite or refer to them.

Every relevant factor bearing on Eleventh Amendment immunity with regard to Louisiana parish school boards has been considered by the Fifth Circuit and resolved against immunity. In contrast, nothing relating either to the responsibility of the Louisiana Board of Elementary and Secondary Education (BESE) or to the purposes of the Louisiana Educational Facilities Asbestos Detection Program, to which petitioner refers in its petition, supports petitioner's contention that it should be deemed an "arm" or "alter ego" of the State. Finally, nothing in this Court's recent decisions in the cases of *Idaho v. Coeur d'Alene Tribe*

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3 *Moore v. Tangipahoa Parish School Board,* 594 F.2d 489 (5th Cir. 1979).

4 *Minton v. St. Bernard Parish School Board,* 803 F.2d 129 (5th Cir. 1986).

5 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

of Idaho and *Printz v. U.S.*, on which petitioner relies to explain its belated assertion of immunity, alters the test applicable to determine eligibility of political subdivisions for Eleventh Amendment immunity. The Orleans Parish School Board's petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

I. Introduction

In 1988, petitioner Orleans Parish School Board ("School Board"), filed an action in Louisiana state court against respondent, W.R. Grace & Co.-Conn. ("Grace"), and a multitude of other former asbestos-containing product manufacturers, seeking to recover for the expenses incurred and to be incurred by the School Board to remove asbestos-containing materials from certain elementary and secondary school buildings, all owned by the School Board and located in Orleans Parish, Louisiana. In January 1989, co-defendant National Gypsum Corporation, filed a removal petition based upon diversity jurisdiction, removing the case to the United States District Court for the Eastern District of Louisiana. The case has proceeded over the past eight years in federal court. All of the manufacturer defendants with the exception of Grace, have settled or were dismissed from the lawsuit. On May 22, 1997, the United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the School Board's claims against Grace, based upon Louisiana's one-year statute of limitations with regard to the claims asserted.

The School Board now has filed a petition for writ of certiorari to this Court, asserting for the first time in eight years that it is immune from suit in federal court based upon the Eleventh Amendment. Petitioner asserts that the "issue was not presented to the district court or appellate court because it is based in large measure on the most recent pronouncements of this Court on state sovereignty principles," articulated in *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S.Ct. 2028 (1997) and *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, (1997).[6]

II. Statement of Facts

Throughout the 1950s, 1960s, and early 1970s, the School Board constructed various elementary and secondary school buildings through its statutory authority to buy and own property,[7] and to enter into contracts, independent of the State, for the management of the property and administration of the schools.[8] Parish school boards have extensive authority in this area:

> . . . City and parish boards may receive land by purchase or donation for the purpose of erecting school houses; provide for and secure the erection of same, construct such outbuildings and enclosures as shall be conducive to the protection of property, and

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6 *See* Petition for Writ of Certiorari at p.2.

7 La. R.S. § 17:87.6.

8 *See* La. R.S. § 17:81.

> make repairs and provide for the necessary furniture, equipment and apparatus.
>
> . . . City and parish school boards have the power to recover for any damage that may be done to the property in their charge; they may change the location of the school house, sell or dispose of the old site, or of any site which for any reason can no longer be used or which is unused and unnecessary or unsuitable as such, and use the proceeds thereof for procuring a new one. **Provided that the Orleans Parish School Board shall have authority to prescribe the rules and regulations to govern the building, equipping and repairing of school houses, and the dates of the meetings of that board....**[9]

Consistent with the accepted practice in the construction industry at the time the schools were built, the specifications for the schools required that the buildings be constructed using various asbestos-containing products. Later, beginning in 1979, the United States Environmental Protection Agency ("EPA") advised school boards and districts across the United States of the EPA's concern for potential health effects posed by asbestos-containing products installed in schools in prior years. In response to the EPA information, the School Board took extensive measures to investigate and address the alleged problem, as described in

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9 La. R.S. § 17:81 (emphasis added).

the opinion of the Fifth Circuit dated May 22, 1997,[10] and the Order and Reasons of the district court dated June 1995.[11] Because the School Board failed to file suit against asbestos-containing product manufacturers until several years after it began to address the presence of asbestos-containing products in its buildings, the district court dismissed the School Board's claims as time barred. The Fifth Circuit affirmed.

III. The Proceedings Below

The School Board admits that its alleged Eleventh Amendment immunity is being raised for the first time before this Court. Nevertheless, the proceedings below for the past eight years are pertinent to put this case in perspective.

The School Board filed its action in state court in August 1988. The removal petition, based upon diversity of citizenship, was filed in January 1989. Eleven months later, in December 1989, the School Board filed a Motion to Remand alleging that the "John Doe" architects cited but not served as defendants, destroyed diversity jurisdiction. In January 1990, the School Board filed a Motion for Leave to File an Amended Complaint, attempting to name, but failing to serve 23 non-diverse architects. The Motion for Remand

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10 The Fifth Circuit's Opinion is reprinted in the Petition for Writ of Certiorari at App. 1.

11 The district court's Order and Reasons are reprinted in the Petition for Writ of Certiorari at App. 9.

was denied in March 1990.[12] In May 1990, the School Board requested an order certifying the denial of the Motion for Remand for appeal, based upon a dismissal of the non-diverse architects. After an initial dismissal of the appeal as premature, the Fifth Circuit ultimately heard the appeal.

The School Board's brief on appeal was directed to the propriety of joining the non-diverse architects to destroy diversity. At no point did the School Board allege that, as an "arm" or "alter ego" of the State, diversity was destroyed *ab intitio*, or raise the issue of Eleventh Amendment immunity. In November 1993, the Fifth Circuit affirmed the district court's denial of the Motion for Remand.[13]

The School Board's Petition for Rehearing was denied, and the case proceeded. The School Board settled with several defendants subsequent to resumption of the case in federal district court. In approximately 1994, the district court focused discovery on the statute of limitations issue, which resulted in a dismissal on summary judgment of the last remaining, non-settling defendant, respondent Grace. The dismissal was affirmed by the Fifth Circuit on May 22, 1997.[14]

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12 The March 26, 1990 Order and Reasons of the United States District Court for the Eastern District of Louisiana is reprinted herein as Appendix A.

13 The November 4, 1993 Per Curiam Decision of the United States Court of Appeals, Fifth Circuit is reprinted herein as Appendix B.

14 *See* Petition for Writ of Certiorari at App. 1.

REASONS TO DENY THE WRIT

The issue before this Court does not involve a conflict among the circuits or a case of first impression requiring resolution by this Court. Rather, the issue is the simple analysis of the status of a parish school board in Louisiana to determine whether petitioner is an "arm" or "alter ego" of the State, thereby either destroying diversity jurisdiction or invoking Eleventh Amendment immunity.[15]

If the School Board is a political subdivision of the State of Louisiana and not the "alter ego" of the State, diversity of citizenship jurisdiction is secure.[16] It also follows that a political subdivision that is not an "arm" or "alter ego" of the state does not enjoy Eleventh Amendment immunity.[17]

Whether a Louisiana parish school board is the "alter ego" of the state has been decided by the United States Fifth Circuit Court of Appeals in *Minton v. St. Bernard Parish*

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15 A state is not a citizen of itself. Accordingly, diversity of citizenship jurisdiction cannot exist when the state is a party. *Moor v. County of Almeda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

16 "[A] political subdivision of a State, unless it is simply 'the arm or *alter ego* of the State,' is a citizen of the State for diversity purposes." *Moor*, 411 U.S. at 717, 93 S.Ct. at 1800.

17 *See Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

School Board[18] and in *Moore v. Tangipahoa Parish School Board.*[19] Applying this Court's analysis in *Mt. Healthy City School District v. Doyle*,[20] the Fifth Circuit concluded without doubt that Louisiana parish school boards are not "arms" or "alter egos" of the state. The same six-part test applied by the Fifth Circuit in the Eleventh Amendment context is appropriate to reach the conclusion that Louisiana parish school boards are not "arms" or "alter egos" of the State for diversity purposes.[21]

I. The Fifth Circuit Analyses In *Minton* And *Moore* Were Correct And Need Not Be Revisited.

In both *Minton v. St. Bernard Parish School Board*[22] and *Moore v. Tangipahoa Parish School Board,*[23] the Fifth Circuit reviewed the nature of Louisiana parish school

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18 803 F.2d 129 (5th Cir. 1986) (in Eleventh Amendment context).

19 594 F.2d 489 (5th Cir. 1979) ("*Mt. Healthy* Straight Up").

20 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

21 The analysis of the status of a political subdivision "'is virtually identical whether the case involves determination of immunity under the Eleventh Amendment or a determination of citizenship for diversity jurisdiction.'" *PYCA Industries, Inc. v. Harrison County Waste Water Management Dist.*, 81 F.3d 1412 (5th Cir. 1996), *quoting Tradigrain, Inc. v. Mississippi State Port Authority,* 701 F.2d 1131 (5th Cir. 1983).

22 803 F.2d 129 (5th Cir. 1986).

23 594 F.2d 489 (5th Cir. 1979).

boards and concluded that the parish school boards were not "arms" or "alter egos" of the State.

Citing the analysis in *Mt. Healthy,* the *Moore* court affirmed the district court's conclusion that the board was not an "arm" of the state with Eleventh Amendment immunity, quoting from the district court opinion:

> "Louisiana school boards, such as the defendant, have the power to sue and be sued. They have the power to contract. They have the power to purchase, hold and sell property. They have the power to borrow funds. They have the power to, and in fact do, levy and collect taxes from which back pay claims can be met.
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> Both the Louisiana courts and federal district courts in Louisiana have consistently held that school boards are autonomous political subdivisions and not the alter ego of the state from the standpoint of sovereign immunity."[24]

In *Minton,* the Fifth Circuit addressed the issue with regard to the St. Bernard Parish School Board, a board created and empowered under the same state laws as petitioner, Orleans Parish School Board, and the defendant in *Moore*. The *Minton* court noted that the analysis performed was necessary to determine if the board enjoyed Eleventh Amendment immunity or, rather, possessed "an identity sufficiently distinct from that of the State of

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24 594 F.2d at 493-94 (citations omitted).

Louisiana to place it beyond that shield."[25] The court cited the relevant factors:

> (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.[26]

Performing this analysis, the court noted that:

> These tests identify parish school boards as local independent agents not shielded by the state's eleventh amendment immunity. Although Louisiana courts have referred to school boards as "agencies" of the state, this characterization does not amount to an assertion that the boards are arms of the state within the meaning of the eleventh amendment. School boards generate funds for the operation of parish school districts through local *ad valorem* taxation, [La. Const. art. 8, § 13] exercise a great deal of discretion in performing their functions and addressing their innately local concerns, [La.

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25 A political subdivision possessing an identity distinct from that of the State supports diversity jurisdiction.

26 803 F.2d at 131.

> Rev. Stat. Ann. § 17:81 (West 1986 Supp.)] have authority to sue or be sued in their own name, [La. Rev. Stat. Ann. §§ 17:51 and 17:81 (West 1982 and 1986 Supp.)] and can hold, use, or sell property as each local board determines necessary to fulfill its obligation to the public. [La. Rev. Stat. Ann. § 17:81 (G) & (H) (West 1986 Supp.)] In view of the inherently local nature of the interests of Louisiana school boards, the wide degree of local autonomy they are granted under state law, and the predominantly local nature of their funding, it cannot be said either that these entities are mere arms of the state or that monetary judgments against them would represent indirect impositions on the state treasury interfering with the state's fiscal autonomy. Louisiana school boards, therefore, are not entitled to eleventh amendment immunity to Section 1983 claims.[27]

Louisiana parish school boards retain identities "sufficiently distinct from that of the state" to preclude any finding that school boards such as petitioner are "arms" or "alter egos" of the State, as is evident from a review of the *Mt. Healthy* factors in relation to the specific constitutional provisions and statutes empowering the Louisiana parish school boards.

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27 *Id.* at 131-32 (footnotes omitted).

II. Based Upon The Analysis Formulated In *Mt. Healthy*, And The Specific Empowering Constitutional Provisions And Statutes, Louisiana Parish School Boards Are Not "Arms" Or "Alter Egos" Of The State.

In *Mt. Healthy City School District v. Doyle*, this Court addressed a contention by an Ohio school district that it was entitled to Eleventh Amendment immunity as an arm of the state.[28] Noting that "[t]he answer depends, at least in part, upon the nature of the entity created by state law," the *Mt. Healthy* court considered the status under state law of political subdivisions such as local school districts; that the school district was "but one of many local school boards within the State of Ohio"; that the school district was "subject to some guidance from the State Board of Education"; and that the district received a "significant amount of money from the State," but had "extensive powers to issue bonds . . . and to levy taxes" as restricted by State law.[29] Balancing these factors, the Court held that the school district was not an arm of the state, and therefore, not entitled to Eleventh Amendment immunity.

Applying the preceding test to Louisiana parish school boards, it is apparent, as the Fifth Circuit consistently has held, that Louisiana parish school boards are political

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28 429 U.S. at 280, 97 S.Ct. at 572.

29 *Id.* at 280, 97 S.Ct. at 572-73.

subdivisions of the state and are not "arms" or "alter egos" of the state for any purpose.[30]

Parish school boards are entities established by the Louisiana legislature at Louisiana Revised Statutes § 17:51, *et seq.*, pursuant to Article 8, § 9 of the Louisiana Constitution, which provides: "The legislature shall create parish school boards and provide for the election of their members."

The legislature provided that a parish school board be established for each of the state parishes, and that each parish school board shall be a corporate entity, with the power to sue and be sued.[31] The parish school board members are elected by the qualified voters of a particular parish, each city or parish school board elects from among its members its president, vice president, and has the authority to fix the terms of office of the president and vice president, not to exceed four years.[32]

The autonomy of the parish school boards is further defined in La. R.S. § 17:81, which provides for the general powers of city and parish school boards. Each city and parish school board has the power to:

> . . . determine the number of schools to be opened, the location of school houses, the

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30 The School Board admits in its brief that Section 44 of Article VI of the Louisiana Constitution defines parish school boards as political subdivisions. *See* Petition for Writ of Certiorari at pp. 11-12.

31 La. R.S. § 17:51.

32 La. R.S. § 17:54.

number of teachers to be employed, and select such teachers from nominations made by the city or parish superintendent . . . .

The boards shall have authority to employ teachers . . . and to fix their salaries.

. . .

Each city or parish school board shall exercise proper vigilance in securing for the schools of the district all funds destined for the support of the schools, including the state funds apportion [sic] thereto, and all other funds.

. . .

. . . [A] city or parish school board shall have the authority, if otherwise applicable, to apply for, receive, and expend funds from public and private sources. . .

City and parish school boards may receive land by purchase or donation for the purpose of erecting school houses; provide for and secure the erection of same, construct such outbuildings and enclosures as shall be conducive to the protection of property, and make repairs and provide for the necessary furniture, equipment and apparatus.

City and parish school boards have the power to recover for any damage that may be done to the property in their charge; they may

> change the location of the school house, sell or dispose of the old site, or of any site which for any reason can no longer be used or which is unused and unnecessary or unsuitable as such, and use the proceeds thereof for procuring a new one. **Provided that the Orleans Parish School Board shall have authority to prescribe the rules and regulations to govern the building, equipping and repairing of school houses, and the dates of the meetings of that board. . . .**[33]

A "school board may sell, lease or otherwise dispose of, at public or private sale, for cash or on terms of credit, any school site, building, facility or personal property which is not used and, in the judgment of the school board, is not needed in the operation of any school or schools within its jurisdiction."[34] Parish school boards also have authority to borrow money to meet their budget or expenditures for the upcoming school year.[35]

Notwithstanding the extensive degree of autonomy established for the strictly local parish school boards, petitioner contends that the Louisiana State Board of Elementary and Secondary Education ("BESE") has sufficient power and control over the "sixty-six local [parish] school boards" to establish that the individual parish boards

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33 La. R.S. § 17:81 (emphasis added).

34 La. R.S. 17:87.6.

35 La. R.S. 17:89.

are "arms" or "alter egos" of the State.[36] While BESE is empowered to "supervise and control the public elementary and secondary schools,"[37] Louisiana's constitution specifically excludes from BESE's powers control at the local level. Indeed, the drafters of the constitution emphasized that BESE "shall have no control over the business affairs of parish or city school board or selection or removal of its officers and employees."[38]

Rather, BESE is directed, by the constitution, to "develop and adopt a formula which shall be used to determine the cost of a *minimum* foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems."[39] This formula shall be developed annually, and "shall provide for a *contribution by every city and parish school system.*"[40] The "[l]ocal funds for the board of elementary and secondary schools shall be derived from sources specified in the Constitution."

The Orleans Parish School Board is particularly directed to "secure its revenues as provided in the Constitution of the state."[41] For the Orleans Parish School Board, the Louisiana Constitution specifically provides:

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36 *See* Petition for Writ of Certiorari at p.9.

37 La. Const. of 1974, Article 8, § 3(A).

38 *Id.*

39 La. Const. of 1974, Article 8, § 13(A) (emphasis added).

40 *Id.* (emphasis added).

41 La. R.S. 17:127.

> The Orleans Parish School Board shall levy annually a tax not to exceed thirteen mills on the dollar of the assessed valuation of property within the City of New Orleans assessed for city taxation, and shall certify the amount of the tax to the governing authority of the city. The governing authority shall have the tax entered on city tax rolls. The tax shall be collected in the manner, under the conditions, and with the interest and penalties prescribed by law for city taxes. The money thus collected shall be paid daily to the Orleans Parish School Board.[42]

In addition, the constitution provides:

> For giving additional support to public elementary and secondary schools, any parish, school district, or subschool district, or any municipality or city school board which supports a separate city system of public schools may levy an ad valorem tax for a specific purpose, when authorized by a majority of the electors voting in the parish, municipality, district, or subdistrict in an election held for that purpose. The amount, duration, and purpose of the tax shall be in accord with any limitation imposed by the legislature.[43]

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42 La. Const. of 1974, Article 8, § 13(C).

43 *Id. (C)*.

Based upon the degree of autonomy of the Louisiana parish school boards, including but not limited to a board's wholly local control over its business affairs and authority to levy taxes without State intervention, the Orleans Parish School Board plainly is not an "arm" or "alter ego" of the State under any analysis. Without doubt, in the context of this litigation, where petitioner, as the plaintiff, sued under its independent status to *recover* alleged damages for its own coffers and the basis for its claims arise out of the exercise of its wholly local administrative powers to own and manage property and construct schools independent of state intervention, the Orleans Parish School Board acted as an independent political subdivision and not as an "arm" of the State.[44]

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44 One of the primary factors consistently considered in the analysis to determine whether a defendant is an "arm" or "alter ego" of the state is whether the state will be called to pay the judgment. *See, e.g., Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 797 (1986) ("To shield states' treasures is one of the most important goals of the Eleventh Amendment immunity."), *citing Edelman v. Jordan*, 415 U.S. 651, 97 S.Ct. 1347, 39 L.Ed.2d 662 (1974). With petitioner as the *plaintiff* in a lawsuit with no counterclaims filed, the treasury of the State of Louisiana will not be called to pay in response to any order by the federal court in this proceeding. The mere fact that petitioner is the *plaintiff* in this lawsuit should itself negate application of the Eleventh Amendment, which precludes suit in federal court *against* a state. *See, e.g., Ames v. Kansas*, 111 U.S. 449, 4 S.Ct. 437, 28 L.Ed. 482 (1884) (suit brought by state may be removed to federal court); *Vermont v. Oncor Communications, Inc.*, 166 F.R.D. 313 (D. Ver. 1996) (Eleventh Amendment does not bar removal to federal court when the state is a plaintiff); *Abrams v. Citibank, N.A.*, 537 F.Supp. 1192 (S.D.N.Y. 1982) (action may be removed even if state is a plaintiff). *But see Moore v. Abbott Lab., Inc.*, 900 F.Supp. 26 (S.D. Miss. 1995) (Eleventh Amendment bars

III. The Orleans Parish School Board Did Not Function As An Arm Of The State By Relying Upon The Louisiana Educational Facilities Asbestos Detection Program.

Petitioner contends that because this lawsuit allegedly evolved from the School Board's reliance upon a statutory scheme entitled the "Louisiana Educational Facilities Asbestos Detection Program," it was functioning as an "arm" or "alter ego" of the State in bringing this lawsuit and should be afforded Eleventh Amendment immunity. As demonstrated below, however, the State of Louisiana did not intend to and cannot create "arms" of the State out of public and private schools throughout Louisiana by the enactment of this group of statutes.

The Louisiana Educational Facilities Asbestos Detection Program was enacted in 1981 in order "to provide a mechanism by which the presence of friable asbestos in the elementary and secondary school facilities occupied by the school children of this state can be detected."[45] These statutes were intended to assist schools in Louisiana in

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removal to federal court of suit brought by state in state court); *California v. Steelcase, Inc.*, 792 F.Supp. 84 (C.D. Cal. 1992) (Eleventh Amendment applies to case brought by state in state court and removed to federal court). As discussed above, however, even if the Eleventh Amendment applies to removal from state court of a case initiated in state court by a state or its "alter ego" as plaintiff, the School Board is not the "arm" or "alter ego" of the State of Louisiana and does not qualify for Eleventh Amendment protection in this case.

45 La. R.S. § 17:3701.

detecting and abating, if necessary, asbestos-containing materials in school buildings.

However, application of the statutes was not in any way restricted to the public schools. Rather, the legislature specifically defined "school," as used in the statute to include public *and* private schools.[46] By extending the assistance afforded by the statutes to public and private schools, it is clear that the legislature never intended the enactment of this statute to create "arms" or "alter egos" of the State, bestowing Eleventh Amendment immunity to any school that sued to recover expenses incurred in connection with the act.

Significantly, as noted by petitioner, the statute provided that the Office of the State Attorney General *could* furnish legal advice "'upon the request of any city or parish school board.'"[47] However, as is plain from the language of the statute, this assistance is optional, not mandatory. In addition, "'[w]henever any civil suit initiated and conducted pursuant to [this section] results in the collection by the school board of monetary damages, the school board shall reimburse the attorney general, upon his request, for any

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46 "Schools" are defined in the statute as "any elementary or secondary school in the state which has received approval from the department as provided in R.S. 17:10, or from the Board of Elementary and Secondary Education, as provided in R.S. 17:11, and which is conducted in a building constructed prior to 1972." La. R.S. § 17:3702. Louisiana Revised Statute 17:10 refers to the approval of *public* schools, which include schools under the supervision of Louisiana parish school boards. Louisiana Revised Statute 17:11 includes all "private elementary, secondary, or proprietary schools accredited in the State of Louisiana."

47 *See* Petition for Writ of Certiorari at pp. 14-15, *quoting* La. R.S. § 17:3713.

vouchered expenses and costs incurred in the conduct of the lawsuit not to exceed forty percent of the amount of the collected monetary damages.'"[48] Accordingly, although a school could invoke the assistance of the State in collecting funds for the school's own coffers, the school would be required to pay for any services provided by the State.[49] The statute essentially authorized the schools to hire the attorney general to assist in litigation *on a contingency fee basis*. This relationship does not reflect the status of "arm" or "alter ego" of the State. Rather, the emphasis is on the independent and separate nature of the schools in this context.

IV. With Few Exceptions, County, District, And City School Boards And Districts Are Not "Arms" Or "Alter Egos" Of Their Respective States.

With near unanimity, federal courts have found that local county (parish), district, and city school boards cannot be considered "arms" or "alter egos" of their respective states. In *Unified School District No. 480 v. Epperson, et al.*,[50] the Tenth Circuit concluded:

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48 *Id.*

49 In this case, the School Board never elected to enlist the aid of the State Attorney General, but rather opted to pursue any recovery on its own.

50 551 F.2d 254 (10th Cir. 1977), revisiting Eleventh Amendment issue on remand, *Unified School District No. 480 v. Epperson*, 583 F.2d 1118 (10th Cir. 1978).

> Local unified school districts in Kansas can sue and be sued, execute contracts and hold real and personal property, and in general possess the "useful powers of a corporation for public purposes." For budgetary and taxing purposes, a local unified school district in Kansas is considered a municipality. The State of Kansas, as does the State of Ohio, furnishes substantial state aid to the local school districts, though the latter fix their own budgets and are empowered to levy and collect taxes within the local school district with which to fund their budget.[51]

In *Travelers Indemnity Company v. School Board of Dade County, Fla.*,[52] the Eleventh Circuit found that Florida county school boards were not arms of the state. Reaching the conclusion that nothing in the nature of a county school board in Florida entitles such a board *per se* to Eleventh Amendment protection, the court analyzed the status of the board in the particular context before the court.[53] Reviewing several cases that discuss awards of retroactive application, as opposed to prospective relief awarded in *Ex parte Young*, the court concluded that: "The more significant distinction is that *Edelman* makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state 'agency' *must* under all circumstances, be paid out of state funds,"

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51 *Id.* at 259-60 (citations omitted).

52 666 F.2d 505 (11th Cir.), *cert. denied*, 459 U.S. 834, 103 S.Ct. 77 (1982).

53 *Id.* at 508.

concluding that the defendant board of education was not protected by the Eleventh Amendment.[54]

The Eleventh Circuit, in *Stewart v. Baldwin County Board of Education,*[55] determined that Alabama school boards were not "alter egos" of the state and, accordingly, did not enjoy Eleventh Amendment immunity. The *Stewart* court "placed considerable significance on the fact that the individual school boards had the means to raise funds, so that any judgment for the plaintiff could be paid out of local funding rather than out of the state treasury."[56]

In *Lester H. by Octavia P. v. Gilhool,*[57] the Third Circuit concluded that Pennsylvania school boards are not "alter egos" of the commonwealth of Pennsylvania, notwithstanding the fact that the commonwealth of Pennsylvania provided significant amount of funds for the local boards.

The Tenth Circuit, in *Ambus v. Granite Board of Education,*[58] concluded that Utah boards of education were not arms of the state. The fact that the boards received

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54 *Id.* at 509 (emphasis in original). In the case before this Court, the issue of the potential for the state to pay any resulting judgment does not arise because the School Board is the plaintiff and no counterclaims have been asserted.

55 908 F.2d 1499 (11th Cir. 1990).

56 *Id.* at 1510.

57 916 F.2d 865 (3d Cir. 1990), *cert. denied,* 499 U.S. 923, 111 S.Ct. 1317 (1991).

58 975 F.2d 1555 (10th Cir. 1992), *affirmed on rehearing,* 995 F.2d 992 (1993).

some money from the state did not provide sufficient identity with the state in the analysis. Addressing the issue with regard to Wyoming school districts, in *Bertot v. School District No. 1,*[59] the Tenth Circuit again concluded that the school districts were not "arms" of the state to be afforded Eleventh Amendment immunity.

In *Adams v. Rankin County Board of Education,*[60] the Fifth Circuit concluded that Mississippi school boards were not afforded Eleventh Amendment immunity because they were locally controlled institutions supported largely by local revenues.

In *Rosa R. v. Connelly,*[61] the Second Circuit found that although the state board of education had "general supervision and control," the Connecticut local school boards were not "arms" of the state. The responsibility for implementing goals and maintaining the public school facilities themselves remain the responsibility of the local boards.

A multitude of district courts have concluded that state school districts possess sufficiently autonomous powers

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59 613 F.2d 245 (10th Cir. 1979).

60 524 F.2d 928 (5th Cir. 1975), *cert. denied*, 438 U.S. 904, 98 S.Ct. 3121 (1978).

61 889 F.2d 435 (2d Cir. 1989), *cert. denied,* 496 U.S. 941, 110 S.Ct. 3225 (1990).

to remain political subdivisions that are not considered "arms" or "alter egos" of the state.[62]

Faced with the well-founded reasoning of so many courts considering empowerments of much less magnitude that the administrative and financial independence afforded the Orleans Parish School Board, petitioner cannot deny that at least in the context of this lawsuit, petitioner is not an "arm" or "alter ego" of the State of Louisiana.

V. The Constitutional Principles Discussed In The Recent Decisions In *Coeur D'Alene* and *Printz* Do Not Change The Outcome In the Instant Case.

Petitioner contends that it is asserting its alleged Eleventh Amendment immunity based upon recent pronouncements of this Court in *Idaho v. Coeur D'Alene Tribe of Idaho*[63] and *Printz v. United States*.[64] Neither of

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62 *See Cline v. School District No. 32*, 476 F.Supp. 868 (D. Neb. 1979) (although Nebraska retained some supervisory interest and provided substantial aid, Nebraska school districts, with authority issue bonds and levy taxes, remained political subdivisions not immune from federal suit under the Eleventh Amendment); *Kenny v. Board of Trustees*, 563 F.Supp. 95 (D. Mont. 1983) (considering the state definition of the entity, the entity's autonomy, and the financial independence of the entity, Montana school districts were not arms of the state with Eleventh Amendment immunity); *Smith v. Travis County Educ. Dist.*, 791 F.Supp. 1170 (W.D. Tex. 1992) (characterization by the state court of the school district as an "agency" of the state did not rise to the level of "arm" of the state to equate with Eleventh Amendment immunity for Texas districts).

63 ___ U.S. ___, 117 S.Ct. 2028 (1997).

64 ___ U.S. ___, 117 S.Ct. 2365 (1997).

those cases provides any basis to revise the *Mt. Healthy* analysis or to contradict the Fifth Circuit's conclusions in *Moore* and *Minton*.

Indeed, in *Coeur D'Alene*, this Court expressly stated that it was not reconsidering its prior interpretations of the Eleventh Amendment.[65] Moreover, the decision in *Coeur D'Alene* depended upon facts and circumstances not present in the case now before the Court, *e.g.*, the application of the *Ex parte Young* exception to Eleventh Amendment immunity in the context of a claim for injunctive relief against a state and state officials to quiet title to what was claimed as state-owned land. Though individuals were sued, the object of the suit was "'to tie the hands of the State.'"[66]

Nor does the Court's opinion in *Printz* provide any relief to petitioners. The *Printz* case involved not the Eleventh, but the Tenth Amendment. The *Printz* court specifically noted that "the distinction in our Eleventh Amendment jurisprudence between states and municipalities is of no relevance here."[67]

The only consideration present in *Coeur D'Alene* and *Printz* that relates to this case is the Court's recognition of the dignity and status of statehood. This is nothing new. The dignity of the state has always been the underlying factor in this Court's interpretation of the Eleventh

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65 117 S.Ct. at 2033 ("We adhere to our precedent."); *id.* at 2034 ("We do not, then, question the continuing validity of the *Ex parte Young* doctrine.").

66 *Id.* at 2034 (citation omitted).

67 117 S.Ct. at 2382, n.15.

Amendment. The dignity of the State of Louisiana is not at issue in this proceeding, brought by a Louisiana parish school board in the exercise of its local powers as a political subdivision and not an arm of the State.

CONCLUSION

Although the Louisiana State Board of Elementary and Secondary Education, BESE, has general supervision and control of the Louisiana parish school boards, BESE is expressly prohibited by statute from exercising any control over administration or management. At all times, the Orleans Parish School Board had complete responsibility for maintaining the local public school facilities themselves. This lawsuit arose out of petitioner's exercise of that specific local and independent authority. Moreover, the state itself will not be called upon to pay any judgment arising out of this lawsuit. Because under the principles articulated by this Court in *Mt. Healthy* and by the Fifth Circuit in *Moore* and *Minton*, petitioner cannot be considered an "arm" or "alter ego" of the State for any purpose, respondent W.R. Grace & Co.-Conn. respectfully requests that this Court deny

petitioner Orleans Parish School Board's Petition for Writ of Certiorari.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ORLEANS PARISH SCHOOL BOARD

VERSUS

UNITED STATES GYPSUM COMPANY, ET AL

ORDER AND REASONS

The motion for leave to amend complaint and the motion to remand filed on behalf of plaintiff, Orleans Parish School Board, were considered this date on memoranda. For the following reasons, both motions are DENIED.

On August 31, 1988, plaintiff filed suit in state court naming twenty-three manufacturers, thirteen contractors, and five architects as defendants. All of the manufacturer defendants were alleged to be citizens of states other than Louisiana, while all of the contractor and architect defendants were alleged to be citizens of Louisiana. The contractor defendants were named only as defendants "A, B, C, D, E, F, G, H, I, J, K, L and M."

On January 6, 1989, prior to service on any of the defendants, National Gypsum Company, one of the manufacturer defendants, removed the suit based on diversity of citizenship. Although the contractor and architect defendants were alleged to be citizens of Louisiana, National Gypsum claimed that they were fraudulently joined;

therefore, complete diversity existed. Since the date of removal, the parties have engaged in extensive discovery and have participated in numerous status conferences.

Plaintiff now seeks to amend its complaint to name additional twenty-seven non-diverse architects as defendants and to have the action remanded back to state court.

MOTION TO AMEND COMPLAINT

Plaintiff seeks to amend its complaint to add an additional twenty-seven non-diverse architect defendants. The applicable statute provides that "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e).

In Hensgens v. Deere & Co., 833 F. 2d 1179 (5th Cir. 1987), the Fifth Circuit set forth the principles to be applied to determine whether the court should allow an amendment to add non-diverse defendants, requiring the suit to be remanded. There are three prime considerations: "the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, [and] whether plaintiff will be significantly injured if amendment is not allowed . . . ." Id. at 1182.

Plaintiff fails all three tests: it is apparent that the purpose of the proposed amendment at issue is to defeat federal jurisdiction; plaintiff has been dilatory in waiting over a year from the date that the suit was removed to file its motion for leave to amend complaint; and plaintiff will not be significantly injured if amendment is not allowed.

Plaintiff is free to file suit against the additional architects in state court. We exercise the discretion given to us by 28 U.S.C. § 1447(e) and deny plaintiff's motion for leave to amend.

MOTION TO REMAND

Plaintiff argues that because all defendants did not join in the removal petition, they are now procedurally barred from doing so, and they have no right to oppose the motion to remand. Plaintiff chose not to serve any of the defendants after filing suit in state court, and National Gypsum Company removed the suit before any of the defendants were served.

Only properly joined defendants who are served at the time the removal petition is filed must join in it. See Pullman Co. v. Jenkins, 305 U.S. 534, 59 S.Ct. 347 (1939). Defendants who are not served at the time the removal petition is filed need not join in it. Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254, 1261 n.9 (5th Cir. 1988). Unserved defendants can either accept removal by doing nothing or, after they are served, can move to remand pursuant to 28 U.S.C. § 1448. Id. at 1262-63. In the instant case, no defendant has objected to removal.

Moreover, even if there were any procedural defects in the removal procedure, plaintiff has waived its right to complain of such defects. The failure of all defendants to join in the removal petition is considered a procedural defect. Id. at 1263; Johnson v. Helmerich & Payne, Inc., 892 F.2d 442 (5th Cir. 1990); Santa Rosa Medical Center, Inc. v. Converse of Puerto Rico, Inc., 706 F.Supp. 111 (D.P.R. 1988). 28 U.S.C. § 1447(c) provides, in pertinent

part, "A motion to remand the case on the basis of any defect in the removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a)." In the instant case, plaintiff waited nearly a year before filing its motion to remand.

Plaintiff also argues that the presence of the fictitiously named contractor defendants in its state court petition defeats diversity and compels remand. 28 U.S.C. § 1441(a) was recently amended to state, in pertinent part, "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."

While the amendment to 28 U.S.C. § 1441(a) became effective after plaintiff filed its state court petition, the amendment has uniformly been retroactively applied to cases pending when the amendment took effect. Bryant v. Ford Motor Co., 886 F.2d 1526 (9th Cir. 1989); Kruso v. International Telephone & Telegraph Corp., 872 F.2d 1416 (9th Cir. 1989); Cowan v. Central Reserve Life of North America Insurance Co., 703 F.Supp. 64 (D. Nev. 1989). We apply the statute and disregard the fictitiously named contractor defendants in determining that complete diversity exists.

Finally, plaintiff argues that the suit should be remanded, contending that the architect defendants named in the state court petition were not fraudulently joined.

Until it filed its remand motion, plaintiff never took issue with the allegation in the removal petition that the architects were fraudulently joined. Instead, plaintiff engaged in extensive discovery, participated in status conferences, and waited almost a year to file its remand

motion. In so doing, plaintiff has tacitly conceded that the architect defendants named in the state court petition were fraudulently joined. We conclude that such participation in this court constitutes a waiver of plaintiff's right to contest defendants' claim of fraudulent joinder. See Johnson v. Helmerich & Payne, Inc., 892 F.2d 422 (5th Cir. 1990); Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981) (per curiam).

As an additional basis for ignoring for diversity purposes the "architect defendants", all of which are allegedly corporations, we note that it is undisputed that not one of those named in the state court petition actually exists.

New Orleans, Louisiana, this 26th day of March, 1990.

/s/ Adrian G. Duplantier
UNITED STATES DISTRICT JUDGE

APPENDIX B

November 4, 1993

MEMORANDUM TO
COUNSEL OR PARTIES LISTED BELOW

Nos. 90-3318 & 90-3421 - *Orleans Parish School Board v. U.S. Gypsum Co., et al.*

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.

The judgment entered provides that plaintiff-appellant pay to defendants-appellees the costs on appeal.

Very truly yours,

CHARLES R. FULBRUGE III, Clerk

Enclosure
All counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 90-3318 & 90-3421

ORLEANS PARISH SCHOOL BOARD,

Plaintiff-Appellant,

versus

U.S. GYPSUM CO., ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana
(CA-89-0070-"H"(2))

Before REYNALDO GARZA, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendants removed this case to federal court, relying on the diverse citizenship of the parties. There was complete diversity of citizenship when the case was removed. Much later, the school board sought leave to amend and add one or more parties whose presence would destroy diversity and defeat federal jurisdiction. The district court stated reasons for refusal to grant leave. See 28 U.S.C. 1447(e). We find no error and affirm.

AFFIRMED.